(22,508 and 22,509.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 887.

HENRY C. RIPLEY, APPELLANT,

vs.

THE UNITED STATES.

No. 888.

THE UNITED STATES, APPELLANT,

vs.

HENRY C. RIPLEY.

APPEALS FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

No. 28555.

HENRY C. RIPLEY
vs.
THE UNITED STATES.

I. *Petition and Amendments.*

Claimant on the 4th day of October 1905 filed his original petition. On the 28th day of March 1907, the claimant filed his amended petition, which, on October 3, 1907, he further amended, by leave of Court, to stand as follows, to wit:

Amended Petition.

Petitioner, by leave of Court first had, files this his amended petition.

I.

Petitioner is a citizen of the United States and of the State of Michigan.

II.

In the act approved June 13, 1902, entitled "An act making appropriations for the construction, repair and preservation of public works on rivers and harbors and other purposes," the Congress of the United States made provision for certain improvements in the harbors of Galveston and Aransas Pass in the State of Texas (32 Statutes at Large, 340). As regards Aransas Pass the purpose of such appropriation was to continue the construction of a jetty of which the Aransas Pass Harbor Company, a private corporation, had previously constructed a part, the paragraph in said bill provid*ed* for that work being as follows:

Improvement Aransas Pass, Texas.—Continuing improvement, $250,000: Provided that the work at this harbor shall be confined to the completion of the north jetty in accordance with the design and specifications of the Aransas Pass Harbor Company and in continuation of the work heretofore carried out on said jetty by said company and to such additional work as may be necessary for strengthening such jetty, and for the removal of such part of the old Government jetty and any other hard material which may interfere with the formation of a channel by the natural action of the current.

2 III.

The plan of said jetty at Aransas Pass was radically different from any other designs that had been utilized in the United States in the construction of jetties. One Lewis M. Haupt had obtained a patent for said plan. Theretofore efforts to obtain an exemplification of it through the appropriations of Congress had failed, and for such exemplification said patentee had given said Aransas Pass Harbor Company license to use it and during such use of it he was consulting engineer for said company. Such construction as had been accomplished by said company on said jetty was done under a contract let by it of which the specifications regarding the order of work, materials and method of construction were as follows:

Plan.—The cross-section will consist of a foundation of brush not to exceed two (2) feet covered with stone three (3) feet thick, and widths as follows: First two thousand feet forty (40) feet wide; next seventeen hundred feet, fifty (50) feet wide; and the next twenty-five hundred feet, sixty (60) feet wide. Or the brush work may be dispensed with wholly or in part at the discretion of the contractor. And a superstructure having a top width of ten (10) feet at an elevation of three (3) feet above the plane of mean low tide and with side slopes of one and one-half ($1\frac{1}{2}$) horizontal to one (1) vertical. The superstructure will be formed of a core of riprap with a surface protection of a large block of stone.

Method of Construction.—The actual location of the work will be furnished to the contractor whenever needed by the engineer in charge by indicating the position for guide piles and ranges. Such piles and ranges to be furnished and placed by the contractor at his own cost. The foundation will first be constructed to its full width and thickness and be kept at least three hundred (300) feet in advance of the ends of the superstructure. The Sections F, A, B, C. D shall be laid first, the working beginning in fifteen (15) feet depth at "F" and extending landward as rapidly as possible, care being taken to deposit the stone evenly and continuously within the limits prescribed for the breakwater, the coarser materials being placed first and the finer materials or quarry refuse on the interior—unless the material comes unassorted so that it is impracticable to separate it. The material composing the core will be placed along the central line of the superstructure, and when of sufficient height
to permit it the sides will be protected by depositing large
3 blocks of stone along either side, and when the core shall
have been completed and the surface leveled off at the proper height and width the placing of the larger blocks will immediately follow; and these latter will be carefully placed with a derrick so as to cover the top and sides of the core completely. In placing the blocks care must be used to make the sides smooth and uniform and the interstices left above the water surface between the blocks after placing them as compactly as possible will be filled with riprap in pieces to suit the size of the voids.

Stone.—The stone must be of good quality, hard and compact and not susceptible of disintegration, and weighing not less than one hundred and thirty (130) pounds per cubic foot dry.

Riprap.—The riprap will vary in size from one hundred pound to one thousand pound pieces to the extent of from 70 per cent. to 75 per cent. of the whole amount. From 25 per cent. to 30 per cent.

will consist of smaller pieces such as the quarry will furnish, and may be denominated "quarry refuse," but it must be free from dirt or very fine stuff.

Blocks.—The blocks of stone for the protection of the exposed top and sides of the superstructure will vary in size from two to five tons, according to the degree of exposure to wave action. The quality of the blocks must be somewhat better than that of the riprap and must weigh not less than one hundred and thirty-five (135) pounds per cubic foot dry.

Brush.—Brushwork will be made into mattresses of approved design.

IV.

On October 10, 1902, Capt. C. S. Riche, of the Corps of Engineers, United States Army, who had charge of the improvements at Galveston and Aransas Pass, published an invitation for proposals for those continued improvements together with specifications, applicable in part to both of said improvements and in parts to the two improvements severally. Such of said specifications as concerned the order and method of the work at Aransas Pass, the materials for and inspection of the work and payment for extra work are as follows:

General Conditions (Applicable to all the Jetty Work).

* * * * * * *

35. Unless extraordinary and unforeseeable conditions supervene, the time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital and experience. If the work is not completed within the period stipulated in the contract, the Engineer Officer in charge may, with the prior sanction of the Chief of Engineers, waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the said Engineer Officer in charge. Should the
original time limit be thus waived, all expenses for inspection
4 and superintendence and other actual loss and damages to the
United States due to the delay beyond the time originally set
for completion shall be determined by the said Engineer Officer in charge and deducted from any payments due or to become due the contractor: Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as in the judgment of the said Engineer Officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which prevented him from commencing or completing the work or delivering the materials within the period required by the contract: Provided further, that nothing in these specifications shall affect the

power of the party of the first part to annul the contract as provided in the form of contract adopted and in use by the Engineer Department of the Army.

* * * * * * *

35. Supervision.—The work shall be executed under the supervision of the Engineer Officer in charge and his duly authorized agents. The order of the work shall be subject to the approval of the Engineer Officer in charge, the allignment of the work shall be prescribed by him, and without his permission no work shall be conducted on Sundays and legal holidays. The contractor shall personally superintend the work during its process, or have it personally superintended by a competent and responsible representative duly accredited as such to this office. Any incompetent, insubordinate, disorderly or objectionable employee of the contractor shall be dismissed from the work if required by the Engineer Officer in charge and not reemployed. Such discharge shall not form the basis of any claim for compensation or damage upon the United States or any of its agents.

38. Inspection.—The United States will employ one or more inspectors on each work. The contractor, without additional compensation, shall, when required, furnish every facility for such inspectors, and for the Engineer Officer in charge and his agents, to supervise and inspect all work and materials, and to send and receive official mail. All transportation necessary for these purposes shall be promptly furnished by the contractor without expense to the United States. Wherever the contractor furnishes board and lodging to his own employees, he shall also, if required by the Engineer Officer in charge, furnish suitable board and lodging to such employees of the United States as are connected with the work, all at reasonable rates satisfactory to the Engineer Officer in charge, to be paid for by the United States with the monthly payments.

* * * * * * *

5 40. Weighing.—All work will be paid by the ton of 2,000 pounds, as determined by the weights shown by a standard railway track scale. The weighing will be done by an agent of the United States, but the track scale and all facilities for adjusting and testing it shall be furnished by the contractor. It shall be located as close as practicable to the work or to the point where the rock is transferred from railway cars to barges, and all costs of weighing, other than the services of the agent of the United States, shall be borne by the contractor. Empty cars returned from the work shall be weighed whenever directed by the U. S. agent in charge. Any disagreement as to weights that may arise between the above mentioned agent and the contractor shall be communicated in writing by the contractor to the U. S. agent in charge, within forty-eight hours of the time at which the disputed weighing was done; otherwise the contractor's contention may be disregarded in preparing the estimates. Rock for which different unit prices are paid shall not be loaded on the same car. The cars shall be assorted and culled before weighing, and all rejections will be in carload lots.

After weighing, the cars shall, as soon as possible, be delivered to the work or be unloaded onto barges in readiness to be towed out and placed in the work; but any rock weighed and not subsequently delivered or placed in the work will be disregarded in preparing the estimates. Inspecting, measuring, and weighing of materials will be done only between the hours of 7 A. M. and 4 P. M., unless other hours should be specifically authorized by the Engineer Officer in charge. If required by said officer, the contractor shall provide displacement wells on each and every barge, with floats and measuring rods, all in accordance with plans which will be furnished him; this for a check to determine whether or not the correct amount of material has been delivered on the work.

* * * * * * *

41. Placing.—Where the contract contemplates the placing of the materials in the work, all materials shall be placed carefully and securely where directed by the U. S. agent in charge. No material dropped overboard, unloaded, or placed otherwise than where directed by said agent will be included in the estimates. Except with the special permission of the Engineer Officer in charge, the placing of all materials in the works shall be done only during
good daylight, which is understood to mean when no light
6 in the lantern of the nearest U. S. lighthouse can be seen at
the work.

42. Extras and Charges.—If, at any time it should, in the opinion of the Engineer Officer in charge, become necessary to do any work or to make any purchase not herein specified, for the proper completion of this contract, the contractor shall furnisher the same at the current rates existing at the time of said purchases or work; said current rates to be determined by the Engineer Officer in charge, and payment therefor to be made with the monthly payments. But changes that involve no material increase in cost shall be made by the contractor, without additional compensation, whenever directed by the Engineer Officer in charge. Such boats, labor, and material (other than surveying instruments and special apparatus) as may be required from time to time to aid the employees of the United States in inspecting, in making surveys, or in other matters connected with the work, shall be furnished for the time by the contractor at cost price (as determined by the Engineer Officer in charge, exclusive of contractor's charges for supervision, superintendence, etc.) whenever required by the United States agent in charge, and will be paid for by the United States with the monthly payments, except where the contractor is herein specifically required to furnish such services, etc., at his own expense.

* * * * * * *

Special Conditions (Applicable to Aransas Pass Jetty).

* * * * * * *

60. Materials.—The materials used in the work will be small riprap, large riprap, and large blocks. Riprap shall be sandstone, limestone, granite, or other rock satisfactory to the Engineer Officer in

charge. It shall be of good durable quality, compact, hard, tough and sound. Sandstone must not weigh less than 125 pounds, limestone not less than 140 pounds, and granite not less than 160 pounds per solid cubic foot. Small riprap shall be in pieces weighing from 10 pounds to two tons, but not over 25 per cent. by weight shall be "one man stone." Large riprap shall be in pieces of not less than two tons in weight, and the average weight shall not be less than 4 tons. Large blocks shall be granite or other rock, weighing not less than 160 pounds per solid cubic foot. It shall be of good durable quality hard, tough, sound, clean, of compact texture, free from loose seams and other defects. Blocks shall be as closely rectangular in form as practicable, and varying not over 6 inches from the dimensions 3½ feet by 5 feet by 8 feet. Their bed surfaces shall be as nearly plane as practicable.

61. Placing.—The materials shall be placed in the work by the contractor in such manner as to bring the jetty to its full cross-section, as shown by drawings on file at this office. Its crest shall be about 4 feet in elevation, 10 to 15 feet wide, with side slopes of about 1 vertical to 1½ horizontal. Pieces of large riprap for the visible portion of the jetty will be selected by the U. S. agent in charge as the large riprap arrives at the work, and, when required by said agent, these selected pieces shall be stored on the work at the expense
of the contractor until such time as, in the judgment of said
7 agent, they can advantageously and properly be placed. Be-
tween stations 27 and 40 the contractor shall place such small quantity of small and large riprap as may be required by the U. S. agent in charge. From Station 40 to the vicinity of Station 55 voids in the old work will be filled and the jetty reinforced with large riprap, only such limited amount of small riprap being used as the U. S. agent in charge may designate. Such replacing of the rock now in the jetty as may be necessary to give a reasonably smooth appearance to the completed work shall be done by the contractor without additional compensation. Between Stations 20 and 27 and from the vicinity of Station 55 seawards the method of construction shall be as follows: A mound of small riprap shall first be built up over and around the existing structure to about one foot elevation. When in the judgment of the U. S. agent in charge this mound has become sufficiently consolidated, its gaps and interstices shall be filled and its crest levelled with small riprap, generally one man stone. Large blocks shall then be bedded in crest of mound in two rows breaking joints with their longest dimensions parallel to the axis of jetty in such manner that voids under the placed blocks will be at a minimum, and side slopes and remainder of crest shall then be covered with large riprap. When completed, the jetty shall present at least as smooth and even a surface to the waves and as finished appearance as the portion between Stations 27 and 40, which was constructed under a prior contract. Where the uncompleted structure is liable to serious damages from waves, as small a length of the jetty as practicable shall be under construction at any one time.

V.

Petitioner desired to bid on the contract so advertised by Capt. Riche, but upon examination of the advertised specifications by himself and said Lewis M. Haupt they made objection that the same varied substantially from the plan and specifications under which said prior work had been done. Their objection being communicated to the Chief of Engineers of the Army he, upon the recommendation of the Board of Engineers having general supervision of river and harbor and improvements, directed that this variance be corrected by the preparation of new specifications. Said Capt. Riche then corresponded with petitioner and said Lewis M. Haupt regarding the changes necessary to be made in the specifications and suggested that, in order to save time, he should merely add amendments instead of preparing entirely new specifications, and he forwarded to said Lewis M. Haupt certain contemplated amendments and invited an expression of his views thereupon. In reply, and at petitioner's request, said Lewis M. Haupt wrote a letter in which he suggested only such modifications of said amendments as he 8 deemed to be indispensable for the conforming of the proposed work to said original design and specifications. Said Capt. Riche made the changes so suggested in his amendments and then, to wit, on November 9, 1902, published the amendments as an additional notice to bidders, those amendments being as follows:

Referring to advertisement, instructions, specifications, proposals, etc., for the construction and repair of the jetties at Galveston Entrance, Brazos River and Aransas Pass, dated October 10, 1902, the attention of contractors is invited to the following special conditions relating to the work to be done at Aransas Pass, Texas. It is the intention to commence the placing of stone at the outer end of the present partially completed work at the point "F" on map of Aransas Pass, published in the Annual Report of the Chief of Engineers for 1900, and build towards the shore to the extent of available funds, and paragraphs 35, 59 and 63, relating to inspection, proposed work and time, in-so-far as they relate to Aransas Pass, are hereby amended to read as follows:

Inspection.—The United States will employ one or more inspectors on the work, and the Aransas Pass Harbor Company may also have an inspector on the work to represent its interests and see that the work is done to its satisfaction. But this latter inspector shall have no power to give orders to the contractor but will submit any communication that he may make to the Engineer Officer in charge or his agent. The contractor, without additional compensation, shall, when required, furnish every facility for such inspectors and for the Engineer Officer in charge and his agents, to supervise and inspect all work and materials, and to send and receive official mail. All transportation necessary for these purposes shall be promptly furnished by the contractor without expense to the United States. Wherever the contractor furnishes board and lodging to his own employees, he shall also, if required by the Engineer Officer in charge, furnish suitable board and lodging to such employees of the

United States as are connected with the work, all at reasonable rates satisfactory to the Engineer Officer in charge, to be paid for by the United States with the monthly payments.

Proposed Work.—The amount of money available for the purpose of this contract is about $200,000. The intent of this contract is to complete North Jetty to its full cross section from its outer end inwards as far as available funds will permit. It is the intention to do all of this work under the same contract.

Time.—The placing of rock in the jetty shall begin within 90 calendar days from the date of receipt by the contractor of his copy of the contract duly approved. The work shall thereafter be prosecuted vigorously and continuously with a suitable plant to insure its completion on or before January 31, 1904. Failure to begin placing rock on time, or failure to earn 25 per cent. of the total 9 amount of the contract, as derived from the approximate quantities, prior to June 30, 1903, or failure to complete the work on time, will give the United States the right to annul the contract, according to the provisions in the form of contract adopted and in use by the Engineer Department of the Army.

Paragraph 61, Placing, is also modified so as to make the crest of the completed structure about three feet in elevation instead of about four feet above mean low water, and ten feet wide instead of ten to fifteen feet wide.

Bidders are especially cautioned to note that the times named in paragraph 63 of the printed specifications are materially modified by the substitute paragraph herein.

C. S. RICHE,
Captain, Corps of Engineers.

VI.

Petitioner on March 11, 1903, submitted to said Captain Riche, at his said office, a proposal on the Aransas Pass jetty work, and at the same time presented to him a letter, of which a copy follows:

GALVESTON, TEXAS, *March* 11, 1903.

Captain C. S. Riche, Corps of Engineers, U. S. A., Galveston, Texas.

CAPTAIN: The proposal herewith for the Aransas Pass jetty work is made with the understanding that the amount of money available for this work is $200,000, and that the amount of the bond required will be 20 per cent. of this, or $40,000, and that I will furnish a surety company bond.

I will also agree to furnish at four dollars and fifty cents ($4.50) per ton in place such proportional part of the large riprap as can be had, in the process of quarrying the small riprap of sandstone or limestone. It is believed that a very considerable percentage of the large riprap can thus be secured.

This proposal is also submitted with the understanding that, on account of the delay in letting this work beyond the time anticipated in the advertisement from December to March, the time for earning 25 per cent. of the amount of the contract will be correspondingly extended.

In view of the increased freight rates over former rates, the increased cost of labor and material, and the necessity of building a new wharf for the transfer of stone from cars to barge, the prices herewith submitted must be regarded as very reasonable.

Very respectfully,

H. C. RIPLEY.

10 VII.

Said bid of petitioner was accepted by said Captain Riche, and on the 6th day of April, 1903, he and petitioner entered into a contract in writing relating to said jetty work, in the words and figures following, the said Captain Riche, in awarding and signing said contract, acting for the United States; which contract was on April 20, 1903, approved in writing by said Chief of Engineers:

1. This Agreement entered into this sixth (6) day of April, nineteen hundred and three, between Captain C. S. Riche, Corps of Engineers, United States Army, of the first part, and Henry Clay Ripley, of Ann Arbor, in the county of Washtenaw, State of Michigan, of the second part, witnesseth, that in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Captain C. S. Riche, Corps of Engineers, United States Army, for and in behalf of the United States of America, and the said Henry Clay Ripley, do covenant and agree, to and with each other, as follows:

That the party of the second part, in accordance with the advertisement and specifications for jetties, dated October 10, 1902, and of the notice to bidders, dated November 29, 1902, amending said specifications, and of the letter accompanying the proposal of the party of the second part, dated March 11, 1903, all of which are hereunto attached, and in so far as they relate to this contract, are made a part of it, shall furnish for Aransas Pass jetty 31,480 tons, more or less, small riprap, of which not to exceed 25 per cent. by weight will be one man stone, properly placed in the work; 21,000 tons, more or less, large riprap, properly placed in the work; 2,510 tons, more or less, large blocks, properly placed in the work, which shall be paid for by the party of the first part at the following prices, to-wit: Small riprap, of which not to exceed 25 per cent. by weight will be one man stone, properly placed in the work, three and 75-100 dollars ($3 75-100) per ton; large riprap (granite), properly placed in the work, four and 60-100 dollars ($4 60-100) per ton; and large riprap, obtained in the quarrying of small riprap, properly placed in the work, four and 25-100 dollars ($4 25-100) per ton; large blocks, properly placed in the work, five and 10-100 dollars ($5 10-100) per ton.

The party of the first part extends the time limit for earning 25 per cent. of the total amount of the contract, as derived from the approximate quantities, as stated in paragraph 63 of the specifications, dated October 10, 1902, and as amended by notice to bidders, dated Nov. 29, 1902, from prior to June 30, 1903, to prior to September 30, 1903.

11 2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the Engineer Officer in charge as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraph 63 of the attached specifications, dated October 10, 1902, as amended by notice to bidders, dated November 29, 1902, and as herein further amended.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise, in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses

and damages to the United States due to the delay beyond
12 the time originally set for completion shall be determined
by the said party of the first part and deducted from any payments due or to become due the party of the second part: Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract.

6. If, at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that
until final inspection and acceptance of, and payment for, all
13 of the material and work herein provided for, no prior
inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraph 34 of the specifications hereto attached and forming part of this agreement.

12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to acrry out this contract either with the transferer or the transferee, but all rights of action for any breach of this contract by said Henry Clay Ripley are reserved to the United States.

13. No member of, or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

14. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

Petitioner furnished the materials and performed the work so contracted for on the Aransas Pass jetty, and, except as is hereinafter recited, he has received the compensation due him from the United States for the same.

VIII.

In said previous work done on said jetty the only requirement regarding the cap blocks was that they should weigh not less than one hundred and thirty-five (135) pounds per cubic foot out of the water, should be roughly rectangular in form, and should be merely of sufficient size to give stability to the structure; no precise dimensions were ever required with reference to any stones of sufficient size. In the course of that work it was ascertained that granite blocks of the weight of one hundred and sixty (160) pounds per cubic foot above water and of mean dimenisons of three (3) feet by four and one-half (4½) feet by seven and one-half (7½) feet were sufficiently heavy; and the only purpose of said Captain Riche, said Lewis M. Haupt and petitioner, in the preparation of said specifications under which petitioner contracted to continue the work, and of said Captain Riche and petitioner, in signing the contract, was to exclude from use as cap blocks all stones less in size than said mean
dimensions or considerably larger in mean dimensions than
14 four (4) feet by five and one-half (5½) feet by eight and
one-half (8½) feet, or not substantially of rectangular shape.
It was also understood between petitioner and said Captain Riche that said stones were to be obtained in the usual way of quarrying and rending granite, including the use of wedges, which cause such stone to break on natural lines of cleavage in which there are necessarily some irregularities; those conditions having been discussed in detail by petitioner and said Captain Riche before they entered into

said contract; and it was understood between them that the stones to be offered by petitioner should be tested, not by extreme but by mean measurements, so that stones generally acceptable and answering the said ascertained need of the work should not be rejected merely because at certain sections they should vary something more than six (6) inches from the dimensions of three and one-half (3½) feet by five (5) feet by eight (8) feet, or should not be exactly rectangular. All the stones provided by petitioner for this use were quarried in said usual way and were approximately rectangular and did not in mean dimensions vary more than six (6) inches from said last named measurements and were as serviceable and valuable for that use as if of those precise dimensions and strictly rectangular. But before petitioner's work was commenced under said contract said Captain Riche had been succeeded as Engineer Officer in charge by Captain Edgar Jadwin, and when the delivery of the cap blocks at the work began said Captain Jadwin and his subordinates charged with the inspection of the stones applied extreme tests to them, rejecting, as a rule, all that varied at any sections as much as six (6) inches from said measurements last named, or in which there was any noticeable variation from rectangularity. Petitioner made protest to said Captain Jadwin against said method of testing the stones, and thereafter, for a time, the exactions of said subordinates regarding the dimensions and shape of the stones were not so rigid, but subsequently the use of said extreme tests was renewed and petitioner again made protest to said Captain Jadwin against that construction of the contract, and said Captain Jadwin then suggested and prepared a supplementary agreement which was signed by him and petitioner and was approved by the Chief of Engineers and the Secretary of War, the text of that agreement being as below:

Whereas, on the 6th day of April, 1903, a contract was entered into between Captain C. S. Riche, Corps of Engineers, United States Army, for and in behalf of the United States of America, of the first part, and Henry Clay Ripley, of Ann Harbor, in the county of Washtenaw, State of Michigan, of the second part, for Aransas Pass jetty, said contract having been approved April 20, 1903, by the Chief of Engineers, United States Army.

15 Whereas, paragraph 60 of the specifications provides as follows:

60. Materials.—The materials used in the work will be small riprap, large riprap, and large blocks.

Riprap shall be sandstone, limestone, granite, or other rock satisfactory to the Engineer Officer in charge. It shall be of good durable quality, compact, hard, tough and sound. Sandstone must not weigh less than 125 pounds, limestone not less than 140 pounds, and granite not less than 160 pounds per solid cubic foot. Small riprap shall be in pieces weighing from 10 pounds to two tons, but not over 25 per cent. by weight shall be "one man stone." Large riprap shall be in pieces not less than two tons in weight, and the average weight shall not be less than 4 tons.

Large blocks shall be granite or other rock weighing not less than 160 pounds per solid cubic foot. It shall be of good, durable quality, hard, tough, sound, clean, of compact texture, free from loose seams and other defects. Blocks shall be as closely rectangular in form as practicable, and varying not over 6 inches from the dimensions of 3½ feet by 5 feet by 8 feet. Their bed surfaces shall be as nearly plane as practicable.

Whereas, it has been found advantageous to all parties concerned to modify said contract so far as it relates to said paragraph 60 of the specifications attached to said contract.

Now, therefore, it is mutually agreed between Captain Edgar Jadwin, Corps of Engineers, United States Army, for and in behalf of the United States of America, and the said Henry Clay Ripley, for himself, executors, and administrators, that the said paragraph 60 of the specifications attached to said contract be modified to read as follows:

Paragraph 60. Materials.—The materials used in the work will be small riprap, large riprap, and large blocks.

Riprap shall be sandstone, limestone, granite, or other rock satisfactory to the Engineer Officer in charge. It shall be of good, durable quality, compact, hard, tough, and sound. Sandstone must not weigh less than 125 pounds, limestone not less than 140 pounds, and granite not less than 160 pounds per solid cubic foot. Small riprap shall be in pieces weighing from ten pounds to two tons, but not over 25 per cent. by weight shall be "one man stone." Large riprap shall be in pieces of not less than two tons in weight, and the average weight shall not be less than 4 tons.

16 Large blocks shall be granite or other rock weighing not less than 160 pounds per solid cubic foot. It shall be of good durable quality, hard, tough, sound, clean, of compact texture, free from loose seems, and other defects. Blocks shall be as closely rectangular in form as practicable, and varying not over 6 inches from the dimensions 3½ feet by 5 feet by 8 feet. Their bed surfaces shall be as nearly plane as practicable, but any large block will be accepted that is as valuable or more valuable to the United States and will make the work as stable or more stable than if the dimensions conformed strictly to the letter of the specifications, and in consideration of the above change the contractor agrees to accept $5.00 per ton for all blocks received under this agreement which would have been rejected under the original specifications.

This agreement shall not be operative until approved by the Secretary of War.

Except as herein modified, the original contract entered into on the 6th day of April, 1903, shall remain in force.

Although said supplemental agreement purported to be a modification of said original contract between petitioner and the United States, it did not in fact change that contract in any respect; it was merely a fuller and clearer expression, as regards the cap blocks, of what was intended to be written into said original specifications and contract. Through said rejection of the cap blocks so provided and the necessity of providing others the completion of the work by petitioner was delayed ten days, and its cost increased five thousand dollars ($5,000). The large blocks so rejected were used as large riprap and petitioner so paid for them at the lower price fixed in the contract for stone of that character. The difference between petitioner's compensation thus received for them and the sum he would have received if they had been accepted and used as cap blocks was forty dollars ($40.00).

IX.

The purpose of said paragraph 61 of the specifications governing said contract between petitioner and the United States, in prescribing that the jetty should be built up steadily to its full cross-section, was that in the performance of the work petitioner's craft, appliances, and employees, operating on the lea side of the structure, should be protected from the action of rough seas and delay of the work thus prevented. Said Captain Jadwin and his said subordinates, however, forbade and prevented the performance of the work in this order, requiring petitioner to build up for a long distance merely the core of the structure, with large riprap on the sides, and not permitting him to place the cap blocks. The work was done in this
17 order from about August 20, 1903, to May 1, 1904. Through the lack of the large blocks on the top of the core the structure was left so low that the waves continually passed over it and greatly interfered with and delayed the work of petitioner's employees and plant on the inner side. If it had been permitted, the cap blocks could have been laid over the entire length of the crest by the 1st day of November, 1903, and thus the said interruption to and delay of the work during the six months following after that day would have been prevented, and petitioner would have been able to work in each month ten days or more in addition to the time he was actually able to and did work. In said specifications relating to the contract taken by petitioner, and in the contract itself, no distance was named over which the foundation of the structure should be laid before any cap blocks should be imposed, because over a large part of the line of the structure the foundation, composed of brush mattresses and riprap, had been laid under said contract let by the Aransas Pass Harbor Company, and the same was compact and in good condition to receive the superstructure. On the portion of the line where no foundation had previously been laid, and where petitioner therefore placed the foundation materials, said Captain Jadwin and the subordinate officers in charge forbade and restrained petitioner from imposing the cap blocks until long after the foundation, in their judgment and, in fact, had become sufficiently consolidated and they had caused the crest to be levelled.

X.

During the delivery and placing by petitioner of the stone on the jetty said Captain Jadwin and his said subordinates many times unlawfully interfered with and delayed said work, and thereby increased the cost of the same to petitioner.

XI.

On one occasion when petitioner already had at the jetty a very small supply of stone the engine of a barge already loaded with stone such as was then needed for the work was broken, and petitioner undertook to expedite the carriage of this material by transferring the stone to another barge with an engine in good order, but said inspector at the jetty forbade and prevented this and required petitioner to transport and he did transport the stone on said crippled barge by other power and at much greater cost than would have attached to the proposed transfer and use of another barge; which action of said Captain Riche was entirely unwarranted and unlawful.

XII.

Petitioner's material for said work was loaded on his barges at the town of Rockport, Texas, fifteen miles from the bar where said work was in progress, and was unloaded at the bar, where it was needed. When it was not feasible to discharge from one of the barges
18 the entire load of stone during the ordinary working hours,
said Captain Jadwin and the inspecting officer at the jetty forbade and prevented the return of the barge to, and its reloading at, Rockport except on the condition that a permit therefor should be obtained in each instance from said inspector; and in order to obtain such permits it was necessary to stop petitioner's tows, drawing the barges, and send ashore to the office of said inspector, which was two miles from the bar. The delay thus caused increased considerably the expense of transportation of the material.

XIII.

The purpose of the provision of paragraph 41 of said specifications that all materials should be placed carefully and securely where directed by the United States agent in charge as the same was understood by petitioner and said Captain Riche when said contract was executed, was that an inspecting agent of the United States should be constantly present during the placing of the stone; but the only agent of the United States who remained at the site of the work was a mere assistant to the inspector in said office, who disclaimed and would not exercise authority regarding this placing of the stone, and petitioner, therefore, whenever there could be any doubt of the proper placing of the stone, was compelled to and did send a boat ashore and bring the inspector to the work. This unlawful requirement considerably delayed the performance of the work and increased the cost of the same.

XIV.

By said unlawful acts of said Captain of Engineers and his subordination, recited in the foregoing paragraphs IX, X, XI, XII and XIII, delaying petitioner's performance of said work undertaken by him, the cost to him of doing the same was increased thirty-two thousand and six hundred dollars ($32,600).

XV.

In the matter of large riprap selected for the visible portion of the jetty, the purpose of Paragraph 61 of said specifications, as understood by claimant and said Captain Riche when they entered into said contract, was merely that pieces of such stone already selected for the work by the agent of the United States in charge, if accumulated faster than needed, should be stored on the work and that the contractor should bear all expense incident to the double handling of the same. It was not intended that the contractor should bear the risk of the loss of any such selected pieces occurring before there should be *be* occasion to use them, but any loss of the same occurring after such selection, through no fault of his or of his employees, was to be borne by the United States. When occasion first arose to store such selected blocks on the completed portion of the work, said inspecting agent of the United States notified the petitioner that for any of such stones as should fall into the 19 water and be lost he would receive no pay. At times petitioner assembled considerable numbers of such selected stones, for which there was no immediate need, and, to protect himself against such loss through accidental submergence of these in the water, he was compelled to remove, and did remove them on his barges to a yard at Rockport, to store them there and load them on railroad cars and deliver them again at the site of the work when they were needed. By said method of handling the selected stones the cost of the work to petitioner was increased one thousand and one hundred and sixty-five dollars ($1,165).

XVI.

At several places when petitioner had completed the mound of said jetty and it was ready for the crest blocks and the selected riprap and the form of the crest had been approved by the United States inspecting agent in charge, said agent required petitioner to remove and he did remove the stone so placed and so reduced the height of the crest, which added work cost him the sum of fifteen hundred dollars ($1,500). There was nothing in the specifications or contract which obliged petitioner to remove this material without compensation, and there was never any agreement or understanding between him and said Captain Riche or other agent of the United States that he should remove the same and not be paid therefor; the only provision applying to this work being paragraph 42 of the specifications, in which it was stipulated that any work not specified, necessary for the completion of the contract, should be done by the contractor, when called on by the Engineer Officer in charge, at current rates of compensation. Said sum of fifteen hundred dollars ($1,500) is the aggregate of this item of the work, calculated in all respects at the rates paid by the petitioner at the time for other and similar work on the jetty and allowed to him in the payments made for such work.

XVII.

Regarding the board and lodging of employees of the United States who should be engaged on or connected with said work, the purpose of the paragraph of the notice to bidders headed "inspection" and of the petitioner and said Captain Riche was that the United States should pay to petitioner therefor the same amounts that he was actually required to pay out at the same time for the board and lodging of his own employees with a reasonable amount in addition to cover such incidentals as should properly be chargeable to such board account. The actual cost to petitioner of the board of his own employees engaged upon said work, exclusive of all incidental expenses, was twenty dollars ($20) per month for each person; but in the payments made to him by said Captain Jadwin he was allowed only fifteen dollars ($15) per month for the board of each of the employees of the United States. At different stages of the
20 work petitioner was required by said engineer officers to furnish, and he did furnish, board and lodging to two of the employees of the United States for an average time of thirteen months; wherefore, at five dollars ($5.00) per month for each of said persons, there was and is due to petitioner the sum of one hundred and thirty dollars ($130) more than was allowed and paid to him.

XVIII.

The purpose of Paragraph 42 of the specifications and of said Captain Riche and petitioner, regarding the rates to be allowed to petitioner for labor required to aid the employees of the United States in the various matters connected with the work, was that he should be paid for such labor at the rates of the actual cost to him of the labor employed by him on the jetty, not the mere current rates for laborers employed for a single day.

The rate paid by petitioner for an individual day's work to workmen thus casually employed was two dollars ($2); but under his contracts with his workmen at large the cost to him of the labor, by reason of the interruptions of the work suffered through no fault of petitioner, was not less than six dollars ($6) per day per capita. The extra labor which petitioner was required to furnish and did furnish was needed and furnished in smooth weather, when there was also need for his men upon the work specified in the contract, and when alone they could be so used, and, therefore, the cost to him of this extra labor was the said sum of six dollars ($6) per day for each man; but said Captain Jadwin allowed and paid him only two dollars ($2) per day for it. At the rate of four dollars ($4) per day for each man, there was and is due to petitioner, above what was paid to him on account of such extra work, the sum of five hundred and sixty dollars ($560).

XIX.

In the matter of delays to the work and extension of time by reason of epidemics and quarantine restrictions the purpose of para-

graph 35 of the specifications and of petitioner and said Captain Riche, was (1) that the Engineer Officer in charge, not as mere matter of discretion, but as an obligation, should allow to petitioner an extension for the time of the continuance of such epidemic or quarantine restriction, and (2) that the time to be allowed should be that of the actual interruption of the work by the epidemic or consequent restrictions, not the mere period of the nominal re-
21 strictions of travel and trade established by law. While the work was in progress there was an epidemic of yellow fever at San Antonio, Texas, petitioner's principal market for the supplies and labor required on said work, and at other points accessible from Aransas Pass; and, under quarantine restrictions imposed by the State of Texas and the cities affected, railroad trains to and from those cities were stopped for about two weeks. The period of the actual interruption of petitioner's work on said jetty resulting from the disorganization of his labor force and the delay of supplies was not less than one month; but said Captain Jadwin allowed to him for the completion of the work contracted for an extension of only fifteen days, relieving him of inspection charges for that time.

XX.

During petitioner's performance of the work so contracted for, a tug brought by him to Aransas Pass for use upon the same was run upon the bar by the pilot in charge and grounded; petitioner having employed said pilot to bring the boat into port because compelled thereto by the laws of the United States and the State of Texas. No act of petitioner or his proper employees caused or in any way contributed to said loss of his boat. The loss of said boat caused a delay of not less than one month; and, therefore, under paragraph 85 of the specifications, said Captain Jadwin was bound to extend the time for his completion of the work one month without charging him the expense of the inspection. No extension of time was in fact allowed petitioner, on account of the loss of said boat, for completing the work and he was not relieved of the expense of inspection for said length of time.

XXI.

Regarding the inspection of petitioner's said work by officers or agents of the United States and the cost to be paid for the same during any extension of time granted to petitioner, it was not the purpose of said paragraph 35 of the specifications, or of petitioner and said Captain Riche, that any excessive expense, disproportionate to that borne by the United States during the contract period, should be incurred by the United States during the period of such extension and imposed by it upon petitioner. During said contract period only two United States inspectors were employed upon said work. When the time for the completion of the work was extended the duties of the inspectors did not become more onerous and said two inspectors were still sufficient; but for the whole term of said extension a third officer was employed, partly in inspecting the work and partly in making maps, which should have been and could well

have been made, without interference with other work of the engineer in charge or the inspectors or other assistants, during the contract period, and in the payment made to petitioner upon
22 the completion of the work the amount of the salary paid by
the United States to said third officer, to wit, one hundred and twenty-five dollars ($125.) was deducted and withheld, and it is still withheld from petitioner.

XXII.

In the settlements made with petitioner for his said work he was charged with and deduction was made for the expenses of inspection of the work during the months of February, March, April, May, June, July and August and seventeen days in the month of September, 1904, including, besides the salary of said third officer referred to in Paragraph XXI hereinbefore, the salary and expenses, amounting to one hundred and thirty-one dollars and thirty-three cents ($131.33), of one of the office assistants of said Captain Jadwin during and for visits made by him to the work; the sum of three hundred and thirty-five dollars ($335.00) being deducted for each month as the salaries of the two ordinary inspectors and the assistant engineer; none of which charges are included in the sums hereinbefore stated with respect to the increased cost of the work to petitioner. From the unforeseeable causes hereinbefore stated, arising through no fault of petitioner, his said operations were delayed for four months and three days, included in said period for which the inspection charges were imposed on him. Said visits of said office assistant to the work were not for the purpose of, and the duty performed by him at the work was not inspection or superintendence of the same, and the service there performed by him would have been necessary if the work had been completed by petitioner in the time fixed in the contract, and it was not occasioned by the extension of the time.

XXIII.

Petitioner, during the performance of his said work, gave his own time and services thereto, constantly directing and superintending it. The reasonable value of his said services during said delay of four and one-tenths (4.1) months was eight hundred dollars ($800) per month.

The premises considered, petitioner prays that the court, if it should deem this necessary, will reform said contract between petitioner and said Captain Riche, acting for the United States, so as to conform it with said specifications of the contract let by said Aransas Pass Harbor Company, with said alleged modification recited in paragraph VIII hereinbefore, and with the allegations of paragraphs IX, XIII, XV, XVII, XVIII, XIX and XXI, and that petitioner may have judgment against the United States in the sum of forty-five thousand nine hundred and thirty dollars ($45,930); no part of his claim against the United States having been assigned and he being the sole owner of the same.

HENRY C. RIPLEY,
By W. H. ROBESON,
His Attorney in Fact.

23 DISTRICT OF COLUMBIA:

Before me, Martha M. Beck, a notary public in and for said District, W. H. Robeson, whose name is written as a part of the signature to the foregoing amendment to amended petition, being by me sworn, made oath that the allegations of said amendment are true to the best of his knowledge, information and belief.

W. H. ROBESON.

Subscribed and sworn to before me this 30th day of September, 1907.

MARTHA M. BECK,
Notary Public.

24 II. *Traverse. Filed April* 1, 1908.

In the Court of Claims of the United States, December Term, A. D. 1910.

No. 28,555.

HENRY C. RIPLEY
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

25 III. *Final Re-argument and Re-submission of Case.*

On the 4th and 5th days of May, 1910, this case came on to be heard. Messrs. William H. Robeson and Benjamin Carter were heard in behalf of the claimant; Mr. Philip M. Ashford was heard in behalf of the defendants; Mr. F. Carter Pope replied and the case was submitted.

26 IV. *Findings of Fact and Conclusion of Law. Filed June* 9, 1910.

Court of Claims of the United States.

No. 28555.

HENRY C. RIPLEY
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant herein is a citizen of the United States, of the State of Michigan.

II.

In the act approved June 13, 1902, entitled "An act making appropriations for the construction, repair, and preservation of public works on rivers and harbors, and for other purposes," the Congress of the United States made provision for certain improvements in the harbors of Galveston and Aransas Pass, in the State of Texas. (32 Stat. L., 340.) As regards Aransas Pass, the act provided:

"Improvement Aransas Pass, Texas: Continuing improvement $250,000: Provided, That the work at this harbor shall be confined to the completion of the north jetty in accordance with the design and specifications of the Aransas Pass Harbor Company and in continuation of the work heretofore carried out on said jetty by said company and to such additional work as may be necessary for strengthening such jetty, and for the removal of such part of the old Government jetty and any other hard material which may interfere with the formation of a channel by the natural action of the current."

III.

On October 10, 1902, Captain C. S. Riche, of the Corps of Engineers, United States Army, who had charge of the improvements at Galveston and Aransas Pass, published an invitation for proposals for those continued improvements, together with specifications applicable in part to both of said improvements and in parts to the two improvements severally, which specifications are numbered 35, 37, 38, 40, 41 and 42, applicable to all jetty work, and 60 and 61 applicable to Aransas Pass jetty, and made a part of the amended petition herein under paragraph 4 thereof. 27

The first paragraph of the specifications relating to the Aransas

Pass improvement, to wit, paragraph 58, consisted of the extract from the Act of June 13, 1902 set out in finding II and the following words:

"Nothing in the contract shall be interpreted as violating any of the requirements and provisions of the above extract."

IV.

Said specifications were sent to claimant, who had assisted in the preparation of same, and to Prof. Lewis M. Haupt, who had been consulting engineer of the Aransas Pass Harbor Company, and was the patentee of the plan on which the jetty was being erected at Aransas Pass.

Both claimant and said Lewis M. Haupt objected to some features of the specifications as published for the reason that they varied substantially from the plan and specifications under which the prior work had been done. Thereupon the Chief of Engineers requested Capt. Riche to withdraw the specifications and prepare new ones so as to fully agree with the original designs and specifications of the Aransas Pass Harbor Company and that the approval of said company should be received before reissuing the same. In order to save time it was agreed that the specifications should not be cancelled entirely but should be modified by amendments which would make them satisfactory to the Aransas Pass Harbor Company and to the claimant. Said modifications were embodied in an amendment which was published November 9, 1902. The amendments so prepared are set out in paragraph 5 of the amended petition. 28 The parts of the specifications of said Aransas Pass Harbor Company which relate to the plan of structure, the method of work and materials to be used are set forth in paragraph 3 of the amended petition.

V.

On March 11, 1903, claimant submitted to said Captain Riche at his office a proposal to do the Aransas Pass jetty work, accompanied by a letter as set forth in paragraph 6 of the amended petition. Said bid of claimant was accepted by Captain Riche and on April 6, 1903 the contract set forth in paragraph 7 of the amended petition was entered into. Said contract was approved by the Chief of Engineers April 20, 1903.

VI.

Claimant entered upon the performance of said contract on the 18th day of August 1903, and completed 2100 feet of the jetty from the outer end thereof shoreward, when operations under the contract ceased, about September 17, 1904, owing to the exhaustion of the appropriation therefor.

In the course of the work a dispute arose between claimant and the United States inspector in charge with reference to the acceptance and rejection of the stones designated in the specifications as crest blocks. Claimant contended that said specifications provided for mean measurement of the blocks, while the inspector adopted extreme measurements and a large number of the blocks were rejected by said inspector as not conforming to the specifications. Many of those so rejected were afterwards accepted, but 90 of the stones offered as crest blocks were rejected as such and were accepted and used as riprap and paid for as such. The difference in the amount paid claimant for said stones used as rip-rap and the amount 29 he would have received if they had been accepted as crest blocks was $400. Claimant was compelled to furnish other crest blocks to take the place of those rejected which caused a delay of ten days to claimant in the completion of the work.

Claimant complained of the rejections of his crest blocks and in May 1904 he visited the engineer's office at Galveston and Captain Edgar Jadwin, who had succeeded Captain Riche as engineer in charge of the work, suggested that claimant write him a letter expressing his views on the subject which might be submitted to the Chief of Engineers at Washington with a view to a relaxation of the requirements as to crest blocks, whereupon claimant wrote the following letter:

ROCKPORT, TEXAS, *May* 22, 1904.

Captain Edgar Jadwin, Corps of Eng'rs, U. S. A., Galveston, Texas.

CAPTAIN: I have just returned from the quarry at Granite Mountain, where I have been to consult with Mr. Steinmetz, of the firm of J. M. O'Rourke & Co., in regard to the large granite blocks to be used in the construction of the jetty at Aransas Pass.

It is found to be very difficult, if not impossible, to get out these blocks of the exact dimensions required by the specifications without resorting to the use of stonecutters. I know that it was not contemplated that this should be done when the specifications were prepared, and it is believed that a slight variation from the exact dimensions given in the specifications will not in any way diminish the value of the block for the purpose for which it is to be used.

I would therefore respectfully request that you will accept any block that is as valuable or more valuable to the Government, and will make the work as stable or more stable than if the dimensions conformed strictly to the letter of the specifications.

Very respectfully,
(Signed) H. C. RIPLEY.

Thereafter a supplemental agreement to take the place of paragraph 60 of the specifications was entered into and signed by claimant and Capt. Jadwin and approved by the Secretary of War, becoming effective September 1, 1904, which agreement is set forth in paragraph 8 of the amended petition.

Two crest blocks of six offered after September 1, 1904 were rejected.

VII.

In the performance of said work it was advantageous to claimant to have his employees operate on the lee side of the structure 30 where they could be protected from the action of the rough seas, and for this purpose it was desirable that he be allowed to impose the crest blocks on the top of the core as rapidly as possible so that the waves could not pass over it and interfere with the workmen, and thus prevent delay in the completion of the contract. The Aransas Pass Harbor Company had laid the foundation for the entire jetty and for 2800 feet, that is, between stations 27 and 55, the entire core of the structure had been built up, and between stations 27 and 40 the crest blocks had been laid. The foundation and the core thus previously constructed were fully consolidated when the contract with claimant was let.

When claimant had completed from 100 to 200 feet of the core he requested from the inspector in charge permission to begin to lay crest blocks which was refused on the ground that the core had not consolidated. By the end of December 1903 claimant had completed 400 to 500 feet of the core and again he requested permission to impose the crest blocks. Said inspector refused and continued to refuse permission to lay said crest blocks until May 1904 at which time between 1400 and 1500 feet of the core had been repaired and completed. Commencing in October 1903 when about 300 feet of the core had been built up to the required elevation, slope stones were laid on the jetty which afforded some protection from the action of the waves to the rip-rap already constructed, but not as much protection as the crest blocks would have afforded. When claimant was thus laying the slope stones, and throughout December 1903, and January, February, March and April, 1904, it was manifest that large parts of the work done by him had fully settled and consolidated. If claimant had been permitted to lay the crest blocks from that time on as the work progressed there would have resulted an additional protection which would have enabled him to work 60
31 days more than he did between that time and May 7, 1904,
date the first crest blocks were laid. When claimant was seeking permission to lay the crest blocks as aforesaid the inspector, in refusing same, alleged as a reason that the jetty had not had sufficient time to consolidate, and it does not appear that any other reason was at any time given by said inspector for so refusing.

VIII.

During the progress of the construction of the jetty certain delays occurred in the unloading of claimant's barges, the placing of stone, and by the system of checking of the barges adopted by the Government to prevent loss at an early stage of the work. It does not appear that any of said delays or any increased cost to claimant thereby was through any fault or negligence on the part of the United States. On one occasion while claimant was unloading stone at the jetty, the hoisting engine of the barge from which the stone was being unloaded broke down and claimant was compelled to return to Rockport with said barge partially loaded. Claimant asked permission of the inspector to transfer the stone to another barge. Said inspector informed him that he did not feel authorized to grant such permission and suggested that claimant telephone to the assistant engineer at the work who had charge of keeping the accounts of the stone placed in the jetty for such permission. This claimant failed to do and any delay caused by failure to transfer the stone was not the fault of the inspector or of the United States.

IX.

Paragraph 61 of the specifications provides that the large pieces of rip-rap selected to be placed in open spaces in the jetty should be stored on the work at the expense of the contractor until such time as in the judgment of the United States officer they could be advantageously and properly placed. As said construction progressed large pieces of rip-rap, selected for use at the sides of the crest
32 blocks, were accumulated and claimant sought from the inspector permission to store these on the jetty until they should be needed. Said inspector informed him that the United States would not assume any risk of the loss of any of said pieces, and would not pay him for any of the same that, falling into the water, should take the place of rip-rap. Thereupon claimant returned considerable quantities of said pieces on his barges to Rockport, about 14 miles distant from the work, unloaded them in a railroad yard and afterwards, as the work was ready for them, loaded them on his barges and carried them a second time to the jetty. Claimant endeavored to have an inspector employed to select the stones at the quarry, offering to pay the expense of such inspection, but Captain Jadwin, engineer in charge of the work, would not consent to such an arrangement and required that the inspection and selection of the stones should not be made until they reached the jetty. Through such second handling of said pieces the completion of the work was delayed two days and claimant was compelled to pay and did pay for extra labor and the use of appliances at said railroad yard the sum of $165.00.

X.

In the construction of the core of the jetty it appeared that at different places pieces of rip-rap placed in the core at the direction and under the supervision of said inspector of the United States projected too far above the designated elevation to permit the laying of the crest blocks thereon, and claimant was required to remove the same so as to lower the jetty in order that said crest blocks might be properly placed, causing a delay in the completion of the work of three days. The removal of said rip-rap was necessary to the execution of the contract.

XI.

As provided in the notice to bidders under the paragraph headed "Inspection," claimant furnished board to one of the Government's employees during the entire time the contract was under
32½ performance and to two others during a portion of the time. For the board so furnished claimant was paid by the United States the sum of $15 per month for each of said employees, amounting to $261.50, which was the usual and customary price paid by the United States for the board and lodging of its employees at other points in Texas.

Claimant's actual outlay for the board of his employees was about $20 per month.

XII.

Paragraph 42 of the specifications provided that claimant should furnish, among other things, labor when required by the United States officer, for work not specified therein, for which the claimant was to be reimbursed by the United States at the cost thereof, to be determined by the engineer in charge.

From time to time claimant did furnish labor called for by the United States officer, which claimant was under contract to pay and did pay at average rates of $60.00 per month. An aggregate of 140 days' labor was thus furnished. By reason of the interruptions to the work the actual cost to claimant of each man's labor was $6 for each day of work.

The United States engineer officer in charge, in determining the cost price of said labor for the purpose of reimbursing the claimant, allowed and paid him $2 per day for labor actually performed, which was the prevailing rate at that place for day labor.

XIII.

During the progress of the work a further delay occurred by reason of an epidemic of yellow fever breaking out in the State of Texas, and quarantine was proclaimed and enforced at San Antonio for 15 days which prevented the operation of trains carrying stones for that time. Owing to these causes claimant's labor forces at the quarry became disorganized for said 15 days and for 15 days more and the completion of the work was in this way delayed for 30 days. The engineer in charge granted claimant an extension of
15 days on account of said quarantine during which time the
33 charges for inspection and superintendence were remitted
amounting to $125.00.

XIV.

At the commencement of the work a tug boat in claimant's employ under the pilotage of a regularly licensed pilot was grounded on a sand bar near the site of the jetty. The general progress of the work on said jetty was delayed 30 days by this accident. The amount charged for inspection and superintendence during such period of delay was about $320 for which no allowance was made to claimant by the engineer. The grounding of said tug was not due to any fault, negligence, or misconduct of any officer or agent of the United States, nor was it due to any fault or negligence on the part of the claimant.

XV.

In addition to an inspector of the stone at Rockport, there were at different times three others employed by the United States, part of whose time was charged to the claimant under paragraph 38 of the specifications, and whose services were necessary for the proper performance of the work under the terms of the contract.

XVI.

In the settlements made with claimant for work done under said contract from month to month deductions amounting to $2264.17 were made for the expense of inspection and superintendence of the work from February 15 to September 17, 1904. For no part of the period of extension allowed to claimant, except the 15 days for said quarantine, was he relieved of any part of said inspection charges. The average charge for inspection for the 7 months was $323.45 per month.

In addition to said inspection charges there were deducted in the month of August 1904 the sum of $72.50 on account of an additional officer, and $83.33 salary and $48 traveling expenses of assistant engineer Hartrick in connection with his visits to the site of the work and the quarry to investigate the complaint of
34 claimant that the large blocks were being rejected improperly.

XVII.

The total cost to claimant of performing the contract, exclusive of the cost of the granite and the cost of transport, and fitting up and repairs to barges, was $63,780. The total number of days from the beginning to the completion of said work was 392, making an average daily cost to the contractor of $162.70.

The work was completed on September 17, 1904. The number of days actual work performed was 131, of which 58 were subsequent to the 30th day of April, 1904.

XVIII.

Claimant, under the requirements of paragraph 35 of the specifications, personally superintended said work the whole time. The value of his personal services in so doing was $750 per month, but it does not appear that at this particular time he had any other enterprise under way or any other employment.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover judgment of and from the United States on findings VI, VII, XIII, XIV, XVI, XVII, and XVIII for the sum of Fourteen thousand seven hundred and thirty-two dollars and five cents ($14,732.05). The petition as to the other items of the claim is dismissed.

By the COURT.

35 V. *Judgment of the Court. Entered June* 9, 1910.

No. 28555.

HENRY C. RIPLEY
vs.
THE UNITED STATES.

At a Court of Claims held in the City of Washington on the ninth day of June 1910, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the claimant and do order, adjudge and decree, that the claimant, Henry C. Ripley, do have and recover of and from the United States the sum of Fourteen thousand Seven Hundred and Thirty-two Dollars and five cents ($14,732.05).

BY THE COURT.

36 VI. *Application for Appeal of Claimant.*

Comes the claimant by his attorney and moves the Court for an appeal to the Supreme Court of the United States from the judgment rendered herein by the Court on the ninth day of June, 1910.

Respectfully submitted,

W. H. ROBESON,
Attorney for Claimant.

BENJAMIN CARTER,
Of Counsel.

Filed August 30, 1910.

VII. *Application of Cross-appeal of Defendants.*

From the judgment rendered in the above-entitled cause on the 9th day of June, 1910, in favor of claimant, the defendants, by their Attorney General, on the 31*th* day of August, 1910, make application for, and give notice of, cross-appeal to the Supreme Court of the United States.

JOHN Q. THOMPSON,
Assistant Attorney-General.
P. M. A.

Filed August 31, 1910.

Ordered.

Ordered that the above appeal of the claimant and cross-appeal of the defendants, be allowed as prayed for.

January 23, 1911.

BY THE COURT.

37 In the Court of Claims of the United States.

No. 28555.

HENRY C. RIPLEY
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, hereby certify that foregoing are true transcripts of pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the final judgment of the Court; of the application of the claimant for allowance of appeal to the Supreme Court of the United States, and of the application of the defendants for the allowance of a cross-appeal to said Supreme Court and of the order allowing said appeal.

In testimony whereof I have hereunto set my hand and the seal of said Court of Claims at the City of Washington this 26 day of January A. D. 1911.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 22508. Court of Claims. Term No. 887. Henry C. Ripley, appellant, vs. The United States. File No. 22509. Term No. 888. The United States, appellant, vs. Henry C. Ripley. Filed February 9, 1911. File Nos. 22508 and 22509.

[illegible], U. S.
FILED.
MAR 9 1911
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

HENRY C. RIPLEY, *Appellant,* v. THE UNITED STATES, *Appellee.*	No. 498
THE UNITED STATES, *Appellant,* v. HENRY C. RIPLEY, *Appellee.*	No. 499

On Appeal From the Court of Claims

STATEMENT OF CASE, ASSIGNMENT OF ERRORS AND BRIEF FOR APPELLANT RIPLEY

WM. H. ROBESON,
Attorney for Appellant.

BENJ. CARTER,
F. CARTER POPE,
Of Counsel.

W. F. ROBERTS COMPANY, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

HENRY C. RIPLEY, *Appellant,*
v.
THE UNITED STATES, *Appellee.*
No. 887.

THE UNITED STATES, *Appellant,*
v.
HENRY C. RIPLEY, *Appellee.*
No. 888.

ON APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF THE CASE FOR CLAIMANT

This case is before this court on the appeal of the claimant from a judgment in his favor for $14,732.05, rendered by the Court of Claims on June 9th, 1910. The claimant says that the conclusion of law is at variance with the findings of fact and that the judgment is inadequate.

The United States prosecutes a cross-appeal, and, as each party is both appellant and appellee before this court, we shall refer to them by their *nisi prius* designations.

This action grew out of alleged violations by the United States of its contract with the claimant for the construction of a section of the jetty at Aransas Pass, Texas. Construction on this jetty had previously been done by private parties, as a private enterprise, on a novel design patented by Professor Lewis M. Haupt. The Government took over the improvement in 1902 under a clause of the rivers and harbors act, approved June 13th, 1902, (32 Stats. L. 340) appropriating $250,000 for the continuation of the improvement, and providing that the work should be confined to the completion of the "north" jetty in accordance with the design and specifications of the Aransas Pass Harbor Company, which company was the last of the private concerns engaged in the construction of the jetty. Specifications were prepared and issued by the engineer department of the United States army as is usual in such work. They provided that "Nothing in the contract shall be interpreted as violating any of the requirements and provisions of the above extract"—an extract from the act of Congress to which we have referred and which is set out in full in Finding II.

The specifications first issued by the engineer department did not conform in every respect with those of the Aransas Pass Harbor Company, and, having been submitted to Professor Haupt, he made some suggestions and they were thereupon amended in some particulars which he deemed to be material. Under these amended specifications, claimant's bid was submitted in March, 1903, accepted in April, and a formal contract entered into.

The plan for the construction of the jetty provided first for the laying of a foundation of brush mattress weighted down by stone over the whole course of the jetty, then the building up of the jetty to a suitable height with small riprap, then the superimposition of heavy blocks of stone on this core (or "mound") and along its sides. The foundation for the entire jetty, however, had some time before been laid by the Aransas Pass Harbor Company and was ready for the claimant to work upon. The specifications of the Aransas Pass Harbor Company did not provide that the crest blocks (or cap blocks) should be of any particular size, except that they should weigh from two to five tons, according to the degree of exposure to wave action. It was also stipulated that their quality should be somewhat better than that of the riprap and that they should not weigh less than 125 pounds per cubic foot dry. The specifications of the engineer department provided that the large blocks should be granite or other rock weighing not less than 160 pounds per cubic foot and that they should be as closely rectangular in form as practicable and vary not over six inches from the dimensions, three and one-half feet by five feet by eight feet, and that their bed surfaces should be as nearly plane as practicable. The specifications also provided that the large riprap (the side or slope stones) for the visible portions of the jetty should be selected by the United States agent in charge as it arrived at the work, and, when required by said agent, these selected pieces should be stored on the work at the expense of the contractor until such times as, in the judgment of said agent, they could advantageously and properly be placed; and for that section of the jetty on which (as it happens) all of claimant's work was done, they provided that the method of construction should be as follows:

> "A mound of small riprap shall first be built up over and around the existing structure to about one foot elevation. When in the judgment of the U. S. agent in charge this mound has become sufficiently consolidated, its gaps and interstices shall be filled and its crest levelled with small riprap, generally 'one man stone.' Large blocks shall then be bedded in crest of mound in two rows breaking joints with their longest dimensions parallel to the axis of jetty in such manner that voids under the placed blocks will be at a minimum, and side slopes and remainder of crest shall then be

> covered with large riprap. When completed, the jetty shall present at least as smooth and even a surface to the waves and as finished appearance as the portion between Stations 27 and 40, which was constructed under a prior contract. Where the uncompleted structure is liable to serious damages from waves, as small a length of the jetty as practicable shall be under construction at any one time."

The specifications also provided that such boats, labor and material as might be required from time to time to aid the employees of the United States in inspecting, in making surveys, or in other matters connected with the work should be furnished for the time by the contractor at cost price (to be determined by the engineer officer in charge, and exclusive of contractor's charges for supervision, superintendence, etc.) whenever required by the United States agent in charge and should be paid for by the United States with the monthly payments. The amendment to the specifications included a provision that:

> "Whenever the contractor furnishes board and lodging to his own employees, he shall also, if required by the Engineer Officer in charge, furnish suitable board and lodging to such employees of the United States as are connected with the work, all at reasonable rates satisfactory to the Engineer Officer in charge, to be paid for by the United States with the monthly payments."

Owing to the delay arising out of the publication of the amendments, the specifications, as amended, provided that "The placing of rock in the jetty shall begin within 90 calendar days from the date of the receipt by the contractor of his contract duly approved. The work shall be prosecuted vigorously and continuously with a suitable plant to insure its completion on or before January 31st, 1904." The specifications contained a provision for extension of the time in case the work could not be completed by the time originally set, in the following words:

> "Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as in the judgment of the said Engineer Officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, *or other unforeseeable cause of delay arising through no fault of the contractor,* and which prevented him from commencing or completing the work of delivering the materials within the period required by the contract." (*Italic ours.*)

The date of the contract was April 6th, 1903, and it was approved by the Chief of Engineers on April 20th. It does not appear on what date the claimant received "his contract duly approved," but, after a delay of 30 days due to the grounding of his tug, claimant began his active operations on August 18th, 1903, and completed his work on September 17th, 1904. In all he constructed 2100 feet of the jetty from the outer end, or Station F, shoreward. (Finding VI, Rec. p. 23.)

The adoption, though merely tentative, of the Haupt design for the jetty in question, when under consideration by Congress, had been strongly opposed by the Corps of Engineers; and the claimant had scarcely entered upon the fulfillment of his contract before the Government representative in charge began to impede and embarrass him by his constructions of the specifications and by arbitrary exercise of his authority—

the most serious and unlawful of which obstructions was the denial to claimant of permission to lay the crest blocks when the work was manifestly ready to receive them. In the performance of the work, it was advantageous to claimant to have his plant and employees operate on the lee side of the structure where they would be protected from the action of the rough seas, and, for this purpose, it was desirable that he be allowed to impose the crest blocks on the top of the core as rapidly as possible, so that the waves could not pass over it and interfere with the workmen and thus delay the completion of the contract. When claimant had completed from 100 to 200 feet of the core, he requested from the inspector in charge permission to begin to lay the crest blocks. This permission was refused on the ground that the core "had not consolidated." In October, 1903, claimant had built up 300 feet of the core to the required elevation and was allowed to lay some of the side or slope stones which broke the action of the waves to some extent but not so much as the crest blocks would have done, because they stopped considerably below the top plane of the crest. It was unavoidable that some time would be lost anyhow because of bad weather and rough seas, but, if claimant had had the protection of the crest blocks, he would have been able to work a great deal of the time which otherwise he would lose. Claimant continued to request permission to impose the crest blocks but the inspector refused and continued to refuse this permission until May, 1904, (*long after the date set for the completion of the entire work*) at which time between 1400 and 1500 feet of core had been repaired and completed. The inspector always alleged as a reason for his refusal that the jetty had not had sufficient time to consolidate and no other reason was ever given for his refusal of the permission. If the claimant had been permitted to commence the laying of the crest blocks in October, 1903, when it was manifest that the core had fully settled and consolidated, he would have had such additional protection to his plant and workmen as would have enabled him to work 60 days more than he did between that time and May 7th, 1904, the date when the first crest blocks were laid. (Finding VII, Rec. p. 25.) As a matter of fact, the number of days worked subsequent to the 30th day of April, 1904, was only 58. The total number of days of actual work was 131, while the elapsed time from the beginning to the completion of said work was 392. The running cost of the work, (exclusive of the fixed charges) was $63,780.00, which, distributed over the 392 days made an average daily cost of $162.70. (Finding XVII, Rec. p. 28.)

After the claimant was permitted to proceed with the laying of the crest blocks, the agent of the United States rejected a great many of them because they did not conform strictly to his theory of the measurements laid down in the specifications, and, while some of these stones were afterward accepted, a great many of them were used as large riprap and paid for as such at much lower prices, to claimant's damage in the sum of $400.00. These rejections, which compelled claimant to furnish other crest blocks in their place, delayed the completion of the work 10 days. After demonstrating that it was impossible to obtain the stones to meet the specifications as they were being construed in the measurements of the engineer officers, the claimant was given a so called "supplemental" contract by the engineer officers, providing that "any large block would be accepted that was as valuable or more valuable to the United States and would make the work as stable or more stable than if the dimensions conformed strictly to the letter of the specifications"—in contemplation of which blocks similar to those previously rejected were accepted, and the engineers compelled claimant to take ten cents per ton less. The stones which claimant was furnishing were as serviceable for the work as they would have been had they conformed strictly to the specifications by the engineer's scheme of measurement. Their fitness depended upon their weight, size and capacity for giving a finished appearance to the work. The claimant contends that the "supplemental" agreement expressed simply what was intended by the original agreement, which was itself controlled by the Aransas Pass Harbor Company's specifications. This, evidently, was the view taken by the Court of Claims when it awarded judgment to claimant on Finding VI.

Claimant in order to do this work had to keep a large force of men under employment all the time, paying them $40.00 per month and boarding them at a cost of $20.00 per month, so that the average nominal cost to him was $60.00 per man per month or $2.00 per day. However, as he was able to work an average of only one-third of the time, the cost of this labor to him was really $6.00 per day. Under his contract with the Government, he was required to furnish to the engineer officer at actual cost (to be determined by the engineer officer) labor whenever required. He did furnish 140 days of such labor and payments to him were made at the rate of but $2.00 per day. (Finding XII, Rec. p. 27.) The Court of Claims allowed nothing on this item.

Claimant also boarded some of the employees of the United States at an expense of $20.00 per month, but the engineer officer paid him for this board at the rate of only $15.00 per month per man. (Finding XI, Rec. pp. 26-27.) The Court of Claims allowed nothing on this item.

Another delay of 30 days in the completion of the work was caused by an epidemic of yellow fever which resulted in an establishment of a quarantine of some two weeks' duration. It caused a disorganization of claimant's own labor forces, of the labor force at the quarry from which he was obtaining his stone and of the transportation facilities in the vicinity. (Finding XIII, Rec. p. 27.)

When January 31st, 1904, arrived and claimant had not completed his contract, the engineer officers proceeded to assess against him the cost to the Government of the superintendence and inspection of the work thereafter, except that they did allow him a credit of one-half of the month of February, the equivalent of the actual duration of the proclaimed quarantine. (Finding XIII, Rec. p. 27.) The inspection charges assessed against claimant amounted to a total of $2,468.00. (Finding XVI, Rec. p. 28.)

The claimant was obliged to give the job his personal attention and the value of his time was $750.00 per month. (Finding XVIII, Rec. p. 28.)

This court has held (see United States v. Smith, 94 U. S., 218) that the Court of Claims need not itemize its judgments, but following the conclusion of law it is evident that the judgment in this case is made up about as follows:

10 days lost time (Finding VI) at $162.70 per day (Finding XVII)	$1,627.00
Difference in price of large blocks (Finding VI)	400.00
60 days lost time (Finding VII) at $162.70 (Finding XVII)	9,762.00
Value of Claimant's time (Findings VI, VII and XVIII)	1,750.00
Reimbursement of inspection charges (Findings XIII, XIV, XV and XVI)	1,193.05
	$14,732.05

We do not pretend to say that the foregoing calculation is exact, but it is as nearly so as it can be figured. However, as this court will take these findings and enter the judgment in its opinion due, the matter is not particularly material.

SPECIFICATION OF ERRORS.

The claimant assigns the following errors of the Court of Claims:

First. In not entering a judgment in claimant's favor for all the time he was delayed by the arbitrary and unlawful acts of the agents of the United States at the *per diem* cost to claimant of $162.70 per day for each and every day.

Second. In not entering judgment in claimant's favor for the value of his own time during all of the delay caused by the arbitrary and unlawful acts of the agents of the United States.

Third. In not entering judgment in favor of the claimant for all the inspection charges assessed upon him by reason of all delays not the fault of the claimant.

Fourth. In not entering judgment for the claimant for the difference between the amount paid him by the agents of the United States for labor furnished to them and the actual cost of such labor to the claimant.

Fifth. In not entering judgment in favor of claimant for the difference between the amounts paid to the claimant for board furnished the agents of the United States and the actual cost of such board to the claimant himself.

BRIEF OF ARGUMENT.

What this claimant undertook to do by his contract with the engineer officers of the Government was to build the jetty at Aransas Pass under their honest supervision. The provision in the specifications, which were made a part of the contract, to the effect that the judgment of the engineer officer should be final, was necessary to secure to the Government the proper authority for, and a method of, enforcing performance of the contractor's obligation; this provision was not exceptional, but, as this court is aware, may be found in all the engineering contracts of the Government. It does not mean, and has never been construed by any court to mean, that the contractor places himself irremediably at the mercy of the caprice, prejudice or arbitrary will of the engineer. The rule, as stated in Kihlberg v. The United States, 97th U. S., p. 402, is:

> "In the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his [the engineer's, here] action in the premises is conclusive upon the appellant as well as upon the Government."

This same rule is stated in a little different language in United States v. Barlow, 184th U. S., p. 123, where it is said:

> "The decision of the engineer in charge of the work * * * was final when properly exercised."

Again in Martinsburg, etc., R. R. Co. v. March, 114 U. S., p. 555, the court said:

> "The estimate of the engineer, upon the basis of the contract price, was conclusive, unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith."

The rule above quoted is followed in Bowe v. The United States, 42d Fed., p. 761, Fletcher v. Railroad Company, 19th Fed., p. 731, and in other cases too numerous to mention.

The corrollary of this rule is that where the judgment or discretion has been exercised fraudulently or in bad faith, or where such gross errors as imply fraud have been made against the other party to the contract, he may recover such damages as he has suffered by reason of the "improper interference" with his work. In short, this claimant was entitled to the benefit of the honest judgment of the engineer in charge over him, and, if he did not get that honest judgment, he is entitled to recover his damages. The petition charges that the agents of the United States did not act in good faith in respect of their requirements of the claimant and the Court of Claims has so found.

This court will perceive that, with the exception of two matters of minor importance to which we will hereafter briefly refer, the main complaint involved in this appeal is the erroneous application of Finding VII to the judgment. The Court of Claims in Finding VII has found that as early as October, 1903, claimant was endeavoring to obtain permission to lay the crest blocks on the core of which "it was *manifest* that large parts * * * had fully settled and consolidated." "Manifest," according to all the dictionaries, means "clear," "plain," "evident to the eye and understanding." So that if it was "manifest" that the core had fully settled and consolidated, it naturally follows that this was known to the inspector and that the denial of the permission to lay the crest blocks (which the claimant had the right to do upon the consolidation of the core) was such a fraud as entitles him to recover the damages he has thereby suffered. The claimant's right to recover could not be more complete had the Court of Claims found in so many words that the decisions of the Government's officer were grossly fraudulent and made in bad faith. Apparently the Court of Claims, with delicate consideration for the feelings of the engineer department, chose to employ different, though just as effective, language. But for the denial of this permission to lay these crest blocks, they would have been laid and thus substantially all of the delay in the completion of the contract would have been avoided.

The fact that the contract was due to be completed by January 31st and that the claimant was not permitted to proceed with a necessary intermediate stage of the work until May 7th, suggests an inquiry if there was not fraud upon his rights, and this inquiry is affirmatively answered when it is found that he was ready, able and anxious to proceed with this intermediate work, and that it was manifest that the structure was in a condition for him to do so. It becomes doubly conclusive when it is seen that, while upon no possible theory could the delay be attributed to him, he is yet mulcted to the full extent of the inspection charges. If the judgment of the Government's officer had been exercised in good faith—that is, if he had really believed that the core had not sufficiently consolidated—it is impossible to conceive a theory of good faith by which the claimant should have been charged with the expenses of the inspection during the resulting delay. Moreover, despite the provision in paragraph 60 of the specifications that "where the uncompleted structure is liable to serious damages from waves, as small a length of the jetty as practicable shall be under construction at any one time," the claimant was compelled to build and maintain nearly, or quite, *two-thirds* of the *entire* 2100 feet of core constructed by him, and for many months, pending the permission to lay the crest blocks, was compelled to leave it unprotected to the violence of the elements. So, we say again, that Finding VII is not merely equivalent to a finding of fraud, but is a plain finding of fraud expressed in the court's own terms. Upon that conclusion the court rendered a judgment in claimant's favor.

First Error Assigned.

It is the utter and inexplicable inconsistency of the judgment of the Court of Claims with its Findings VII and XVII which makes this appeal necessary. What the claimant is entitled to recover for is not merely the 60 substituted working days. He is entitled to recover for each and every day of actual delay forced upon him by the unlawful denial of the permission to lay the crest blocks (Finding VII) at the per diem cost of such delay to him—$162.70 (Finding XVII). It is respectfully insisted that this delay was exactly 145 days. If the claimant would have done *60* days more work *before* May 7th, but only *58* days work were required after April 30th, necessarily he would have finished not only *by*, but *some days before* April 30th; and, as Finding XVII shows that he was able to work an average of only one day in three throughout the whole period of the contract (including the more rapid work after he was allowed to lay the crest blocks), the Government certainly cannot complain if the same ratio be employed, for the purpose of this calculation, in determining a definite date, prior to April 30th—which would carry the date of completion back to at least as early as April 25th; and from April 25th to September 17th is 145 days. Though Finding VII accurately shows the loss to claimant of these 145 days at an average expense of $162.70 for each day, the Court of Claims completely ignored all but the mere 60 working days which the claimant had to make up at a later time. The judgment of the Court of Claims on this item instead of being for $9762.00 should have been for

$23,591.50, representing the actual delay to the claimant resulting from the unlawful denial of the permission to lay the crest blocks.

Second Error Assigned.

This assignment has to do with the amount properly due to the claimant as compensation for his own time, which the court by Finding XVIII has valued at $750.00 per month. The Court of Claims apparently has allowed judgment to claimant for the two and one-third months represented by the ten days delay referred to in Finding VI and the 60 lost working days referred to in Finding VII. The amount thus due to the claimant is, of course, determined by the time he was unlawfully delayed by the agents of the Government, and, besides all the time after April 25th, (as we have demonstrated in our discussion of the first assignment of error) includes those additional 10 days of delay caused by the unlawful rejection of the crest blocks (Finding VI), which carries the time back to April 15th. The claimant, therefore, should be compensated for five months and two days, and the amount should be $3800.00, instead of $1750.00, allowed him by the Court of Claims.

Third Error Assigned.

This assignment has to do with the amount properly reimbursable to the claimant as remission of the inspection charges. The Court of Claims, though recognizing the correctness of the proposition that the claimant should recover the inspection charges, has, as to the quantum of recovery, made the same mistake as in its judgment with respect to the reimbursement for claimant's time and expenses. The court has allowed the claimant only the balance of the

February inspection charges (Finding XIII), the $320.00 covered by Finding XIV and two and one-third times the average monthly charges as shown by Finding XVI.

Under the specifications the claimant was entitled to be free of all expense of inspection during delays not occasioned by any fault of his, (Rec. pp. 3, 22) and the true method of determining the judgment on this item is to ascertain when, but for such delays, he would have finished, then charge him with the inspection expenses between January 31st and that date. As we have shown above, but for the delays unlawfully occasioned by the Government's agents, the claimant would have finished the work by April 15th. However, the progress of the work was delayed 60 days more by the epidemic of yellow fever (Finding XIII) and by the accident to the claimant's tug (Finding XIV), neither of which, as the Court of Claims has found, was the claimant's fault. It is obvious, therefore, that but for the combination of all these delays, none of which was the fault of the claimant, he would have finished the work by the 15th of February, 1904. Consequently, the most with which he could be charged is one-half month's expense, which, at the average rate of $323.45 a month, would be $161.72. The total of all these expenses which have been denominated inspection charges is $2,468.00. This amount includes some extra expenses incurred by the Government in inspecting the crest blocks which were being rejected unlawfully; but, if the claimant is entitled to a judgment on Finding VI, he is entitled to a judgment on Finding XV. In any event, these items were a part of the inspection charges, all of which the claimant is entitled to recover except $161.72. The judgment on this item, therefore, should be for $2,306.32.

Fourth Error Assigned.

This assignment relates to the difference between the prices paid to the claimant ($2.00 per day) for the labor furnished by him to the Government engineers and the actual cost ($6.00 per day) of such labor to the claimant himself, covered by Finding XII; and though the finding shows just what the cost was, that is disregarded in the judgment. The Court of Claims, after determining the actual cost to the claimant of this labor as $6.00 per day, found that the "United States engineer officer in charge in determining the cost price of said labor for the purpose of reimbursing claimant, allowed and paid him $2.00 per day for labor actually performed, which was the prevailing rate at that place for day labor." The court does not, in this finding, intimate that the underpayment was the result of any fraudulent underestimate by the engineer officer, and, doubtless, for that reason denied a judgment on this item of the claim. In view of the general conduct of the engineer officers toward the claimant, as disclosed by these findings, it is difficult to acquit them of a deliberate intention to defraud the claimant even in this minor matter, notwithstanding the failure of the Court of Claims to find any fraud. But we are not concerned with any motives of the engineer officers in this matter. This is a case not of misuse of, but of failure to use, the discretion with which the Government representative was vested. The engineer, in other words, abrogated the function which the contract gave him and did something that he had no color of authority to do. His duty was to determine and allow to the claimant the cost to him (claimant) of the labor he was required to furnish for the Government's uses. He in fact allowed the theoretical cost of doing the same work by employing labor by the day—wrongly assuming too that the workmen could be found at that point for a day's work when the weather chanced to be favorable.

If the engineer had professed to allow the claimant the actual cost of his labor, claimant would be helpless unless he could convict the engineer of bad faith. There was no such profession, however. The engineer inquired of nothing but the cost of labor employed and paid by the single day, and allowed this only to claimant. It is respectfully insisted that the claimant should have judgment for the 140 days' labor at an additional $4.00 per day, or $560.00.

Fifth Error Assigned.

This assignment has to do with the difference between amounts paid to claimant for the board of employees of the United States and the actual cost of such board to claimant himself. The specifications on this subject are very much the same as on the question of labor to be furnished, and what we have said there applies here; there is no substantial difference between the two questions. The Government paid the claimant $261.50 for board furnished by him to its employees, at the rate of $15.00 per month, which, as the court finds, "was the usual and customary price paid by the United States for the board and lodging of its employees at other points in Texas," while as the court also finds, "claimant's actual outlay for the board of his employees was about $20.00 per month." It does not appear that the cost to claimant for the board of the employees of the United States could have been less than the cost of the board of his own employees. The claimant should be allowed $5.00 per month additional on this item, being one-third of the $261.50 paid him, or $87.16.

RECAPITULATION.

The judgment of the Court of Claims should have been made up as below:

Delay by reason of unlawful rejection of crest blocks (Findings VI and XVII), 10 days at $162.70	$1,627.00
Difference in prices paid for stone unlawfully rejected (Finding VI)	400.00
Delay by reason of unlawful refusal of permission to lay crest blocks, 145 days, at $162.70 (Findings VII and XVII)	23,591.50
Value of claimant's time for five months and two days, at $750.00 per month (Finding XVIII)	3,800.00
Remission of inspection charges (Findings XIII, XIV, XV and XVI)	2,302.32
Difference in cost of labor (Finding XII)	560.00
Difference in cost of board (Finding XI)	87.16
	$32,371.98

We have confined our assignments of error to the fewest possible number, eliminating all questions about which there could well be any argument. While the findings are not entirely satisfactory to claimant, they must be presumed to contain all that the Court of Claims deemed material to the case. If, in the counsels of the Court of Claims, there had been any reason for denying to claimant the judgment we assert to be due him, that court has given no hint of it in the findings. These findings present a tale of great wrong and hardship inflicted upon this claimant. Taken in connection with the two small delays indicated by Findings IX and X, they show that the claimant, but for the *unlawful* delays forced upon him by the agents of the Government, would have completed his contract not only within the time as automatically extended by the fever epidemic and the grounding of the tug, but within the time set by the contract. One of the other small delays (Finding X) was plainly the fault of the Government, due we might concede, to an honest mistake of judgment; while the other (Finding IX) was caused by different constructions of a clause in the specifications which reasonable men might read in different lights. They are comparatively trivial and because they are not of the same impelling character we prefer to ask no more than that the judgment shall be made consistent with the findings we have discussed; and we invite the closest scrutiny of our analysis of what the judgment should be.

Defendant's Appeal.

After claimant had taken an appeal, the defendants prayed their cross-appeal. Assuming that their position here will be the same as it was in the Court of Claims, it will be contended that, though delays were caused by defendant's agents in authority over claimant, though there were charges for inspection during these delays, though claimant paid more for labor and board than the defendant allowed him, yet these and all other questions were to be determined by the defendant's agent as the final arbiter, and that unless fraud or gross error is shown, the claimant is without remedy. As to the largest items, that is precisely the ground we stand upon, and stood upon in the court below; so that, it must be demonstrated by defendant that the findings do not show that the engineer officer consciously denied the claimant his rights.

The case at bar presents no aspect to take it out of the general rule of law, governing contracts, that one party to the contract must not do anything to increase the burden or expense of the other's performance. The consequences, to the claimant, of the refusal of the permission to lay the crest blocks when "it was manifest" that the core was in condition to receive them, were self-evident to the engineer. Aside from the language of Finding VII, every surrounding circumstance was such as to repel absolutely any idea of honestly mistaken judgment or the exercise of good faith on the part of the engineer. The findings speak for themselves. There is no need to go over the same ground again, and there is nothing to be added—except, perhaps, that if "it was manifest" that the structure was ready to receive the crest blocks in October, 1903, then it must be equally manifest that the only reason given for refusing claimant permission to lay them was wholly false.

In conclusion, it may not be amiss to emphasize the fact that claimant's operations and progress in every respect were subject to the dictation of the engineer officer. He could determine what stone to accept or reject; nothing could be placed in the jetty except upon his express direction; in one way or another he could control the time and order of the work; he could determine what portion of the delay was not the fault of the claimant. The amount claimant might have for board and labor furnished was also subject to the engineer's determination. The exercise of such power should have been attended with the utmost circumspection and supported by a show of reason. The postulates for correct decisions in every case were so simple as to stare him out of countenance; yet, on absolutely every question entrusted to him, these findings show that the engineer officer, the agent of the United States, erred against claimant. The circumstance is of peculiar and persuasive significance as to the entire attitude and purposes of the Government's agents.

The claimant's right to judgment on the larger items of the claim, we repeat, is based on the fraud of defendant's agents; while on the smaller items he is entitled to judgment because, in determining the matters presented, the engineer disregarded the contract and reached his conclusions by other means, as a result of which gross errors were committed against claimant.

The judgment, we submit, of the Court of Claims should be corrected and judgment entered here for $32,371.98 as set out in the recapitulation.

Respectfully submitted,

WM. H. ROBESON,
Attorney for Claimant.

BENJ. CARTER,
F. CARTER POPE,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

Nos. 887 and 888.

HENRY C. RIPLEY, APPELLANT,
v.
THE UNITED STATES, APPELLEE.

THE UNITED STATES, APPELLANT,
v.
HENRY C. RIPLEY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF THE CASE FOR THE UNITED STATES.

The suggestion of opposing counsel that the *nisi prius* designations of the parties here be used in the briefs is a good one, and we will follow it.

The statement of this case for claimant contains so many inferences and conclusions sought to be drawn from the facts as found by the court that we deem it advisable to state the case in full, as we understand it. Before proceeding, however, we call attention to a statement contained in the last paragraph, beginning on page 5 of claimant's brief. It is there said that the plan or design for the jetty in question "had been strongly opposed by the Corps of Engineers." We search the findings in vain for any such statement of fact. But conceding it to be a fact of which the court may take judicial notice as coming from the public hearings before the Rivers and Harbors Committee of Congress and the official reports of the Engineer Department of the United States Army, it is important only in connection with what immediately follows the statement above quoted. It is apparent upon the slightest reflection that whether the engineer officers were opposed to the plan or not would in and of itself have no possible bearing upon a contract duly entered into, or upon the manner of its performance. But, it is stated that—

> claimant had scarcely entered upon the fulfillment of his contract before the Government representative in charge began to impede and embarrass him by his construction of the specifications and by arbitrary exercise of authority, etc.

The Court of Claims made no such statement in its findings, nor did it state any matter from which it is fair to draw such an inference.

We could not, of course, object to counsel urging this view upon the court as an argument, under proper conditions, in support of its contentions. But, since we understand a "statement of the case" to be merely a narrative of the facts as found by the trial court, we are compelled to respectfully suggest that claimant's statement be not accepted as the plain statement of the facts in this case.

At some time prior to 1902 a company known as the Aransas Pass Harbor Co. undertook to construct a jetty at Aransas Pass, on the coast of southwestern Texas, in accordance with a design for a "reactionary" jetty, patented by Prof. Louis M. Haupt. Under the auspices of this company certain portions of the projected jetty were partially constructed.

In June, 1902, Congress made an appropriation of $250,000 for the purpose of completing the "north jetty" in accordance with the design and specifications of the Aransas Pass Harbor Co. and to do such additional work "as may be necessary for strengthening such jetty." (Finding II, Transcript, p. 22.)

Following this appropriation, the War Department, through its district engineer located at Galveston, Tex., began preparations for carrying out the purposes of the appropriation. The first thing was to prepare specifications for the work. To this end Henry C. Ripley, the "claimant" in this case, was invited to assist, and did assist, in the preparation of the specifications. After the same had been prepared they were published and invitations for proposals called for, on October 10, 1902, by Capt. C. S. Riche, district engineer, United States Army (Finding III, Transcript, p. 22), and a copy of the same was sent to claimant and to Prof. Haupt, who had been consulting engineer of the Aransas Pass Harbor Co. and who was the patentee of the plan or design on which the jetty in question was being constructed. (Finding IV, par. 1, Transcript, p. 23.)

After receiving the copies of said specifications both claimant and Prof. Haupt objected to "some features" thereof, because they did not conform to the plan and specifications under which the Aransas Pass Harbor Co. had been procuring the work to be done. The specific features objected to are not set forth in the findings of the court, but are referred to in such a way as to distinguish them. (Finding IV, par. 2, Transcript, p. 23.)

The principal objection related to the elevation of the proposed jetty above low water and to its width on top. It was suggested by claimant or by Prof. Haupt that the crest of the completed structure be made 1 foot lower and 5 feet narrower than was provided for in the specifications submitted. Objection was also taken to the provision for beginning the work, it being claimed that it was part of the plan of the Aransas Pass Harbor Co. to build the jetty from the outer end toward the shore. Some question was also raised as to the right of the Aransas Pass Harbor Co. to have an inspector on the work (par. 5, amended petition, Transcript, p. 7).

As a result of these objections the Chief of Engineers directed Capt. Riché to withdraw the specifications published and prepare new ones, so as to fully agree with the original designs and specifications of the Aransas Pass Harbor Co., and that before reissuing the same the approval of said company be obtained.

In order to avoid the loss of time which would necessarily occur in case the specifications were reissued and invitations for proposals readvertised, Capt. Riché, Mr. Ripley, and Prof. Haupt agreed upon certain modifications which made them satisfactory to the Aransas Pass Harbor Co., and they were embodied in amendments which were published on November 9, 1902, and submitted to intending bidders. (Par. 2, Finding IV, Transcript, p. 23.)

These modifications, while not set forth in the finding, are referred to and will be found in the amended petition, paragraph 5. (Transcript, pp. 7 and 8.)

On March 11, 1903, claimant submitted a bid to construct said jetty, in accordance with the advertisement and specifications as amended. Said bid was accepted, and on the 6th day of April, 1903, a written agreement was entered into by and between said Henry C. Ripley, claimant, and Capt. Riché for the United States, wherein it was agreed that claimant should construct said jetty in accordance with the amended specifications, furnishing and placing, for that purpose, 31,480 tons, more or less, of small riprap, for which he was to receive compensation, when properly placed in the work as required by the specifications, $3.75 per ton; 21,000 tons, more or less, of large riprap, for which he was to receive, when properly placed in the work in accordance with the specifications, $4.80 per ton; 2,510 tons, more or less, of "large blocks," for which he was to receive compensation, when properly placed in the work in accordance with the specifications, $5.10 per ton.

In addition to this, he was to furnish an indefinite quantity of large riprap obtained in the quarrying of small riprap, for which he was to receive, when properly placed in the work according to the specifications, $4.25 per ton. This contract was approved by the Chief of Engineers April 20, 1903, and provided that the work of placing rock in the jetty should begin within 90 calendar days from that date and should be completed on or before January 31, 1904. (Finding V, Transcript, p. 23; Par. VII of the petition, Transcript, p. 9; Par. V of the petition, Transcript, p. 7.) The number of tons of each class of stone was determined by the estimated quantity of such necessary to make complete a certain portion of the jetty, and to bring the total amount to be paid therefor within the appropriation available. (Transcript, p. 8.)

Claimant entered upon the performance of said contract on the 18th day of August, 1903, and completed the same about September 17, 1904. The placing of the quantities of rock of the different classes above indicated effected the completion of about 2,100 feet of the jetty, from the outer end toward the shore. (Par. 1, Finding VI, p. 23.)

The United States placed an inspector of the stone at Rockport (Finding XV, Transcript, p. 27), where the stones were received from the quarries to be conveyed by sea to the site of the work, where another inspector was in charge for the United States. The inspector stationed at Rockport weighed and measured the stones intended for "crest blocks" and marked the same "accepted" or "rejected," according as he found them to be within or without the provisions of the specifications, with reference to the size, shape, and dimensions thereof. The inspector at the site of the work again passed upon or inspected said crest blocks, and it so happened that he sometimes *accepted* stones intended for crest blocks which had been *rejected* as such by the inspector at Rockport, and the same were placed on the crest of the jetty and paid for as crest blocks. It does not appear that in any instance he ever *rejected* a stone which had been *accepted* as a crest block by the inspector at Rockport.

The stones "rejected" as crest blocks, were used as large riprap and paid for as such. Crest blocks, it will be remembered, were to be paid for at the rate of $5.10 per ton, and large riprap at $4.60 per ton, the difference, 50 cents per ton, for the 90 stones rejected as crest blocks but used as large riprap, amounting to about $400. (Finding VI, Transcript, p. 24; Petition, par. 7, Transcript, p. 9.)

Claimant Ripley complained both to the inspector in charge at Rockport and to the district engineer at Galveston about the rejection of said stones intended for crest blocks, contending that the specifications provided for "mean measurement" of the blocks, whereas the inspector and the engineer in charge held that the specifications provided for "extreme measurement." (Finding VI, par. 2, Transcript, p. 23.)

In this connection, it may be well to explain the meaning of the terms "mean" and "extreme" measurements, although it may more properly belong in the argument. The exact language of the specification describing the crest blocks is as follows:

> Large blocks shall be granite or other rock weighing not less than 160 pounds per solid cubic foot. It shall be of good durable quality, hard, tough, sound, clean, of compact texture, free from loose seams and other defects. Blocks shall be as closely rectangular in form as practicable and varying not over 6 inches from the dimensions 3½ feet by 5 feet by 8 feet. Their bed surfaces shall be as nearly plane as practicable. (Specifications, latter part of par. 60, Transcript, p. 6.)

According to the construction given this provision by the engineer in charge and his inspector, a stone which at any point exceeded 8 feet and 6 inches or fell below 7 feet and 6 inches in length was rejected. Likewise as to its thickness and breadth. To be more specific, if the stone was 5 feet wide throughout its length, 3½ feet thick throughout its length, its bed surface plane and as closely rectangular in shape as practicable, and its main part 8 feet long, but had a projection which when measured with the main part of the stone made 9 feet in length, the stone would be rejected as varying more than 6 inches from the dimensions specified; or if the stone was 8 feet in length throughout its breadth, 5 feet in width throughout its length, and 3½ feet thick throughout its main length, but had a hump which was 4½ feet in heighth from its bed surface, it would be rejected as varying more than 6 inches from the dimensions specified.

According to the contention of the contractor, even though a stone might be within the specifications as to width and height, but reached at one point 9 feet, it should be accepted if the mean or average length of the stone, taking its width 5 feet as the basis for calculation, was within 6 inches of 8 feet, and so with each of the other dimensions of the stone offered. The contractor contended that the average or mean dimension should be accepted.

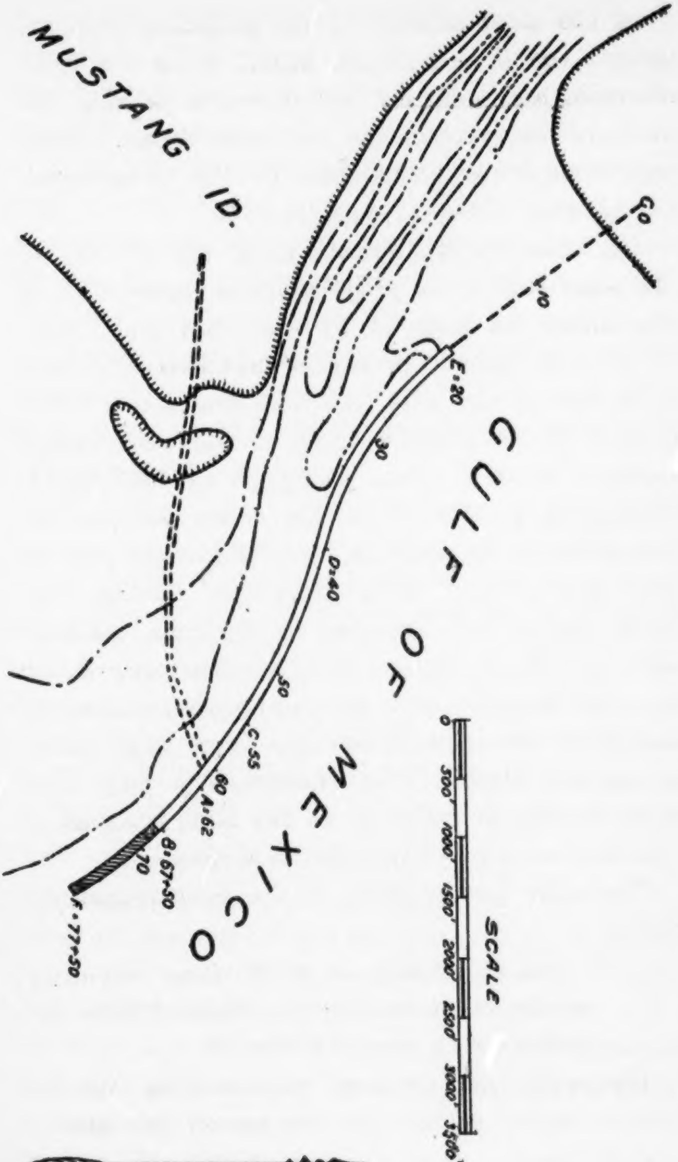
Not being able to agree as to the proper construction of the specifications with respect to this matter, the contractor addressed a letter to the engineer in charge at Galveston, Tex., in which he complained in substance that it was never contemplated that these large stones should conform to the exact dimensions required by the specifications; that it had been found very difficult to get them out at the quarries so as to conform to the requirements of the specifications, and urged, that inasmuch as a slight variation would not in any way diminish the value of the block for the purpose for which it was to be used, the Government should accept "any block that is as valuable or more valuable * * * and will make the work as stable or more stable than if the dimensions conformed strictly to the letter of the specifications." (Par. 6 of the Findings, Transcript, p. 24.)

This letter was dated May 22, 1904, and was immediately referred to the Chief of Engineers at Washington. Thereafter a supplemental agreement was entered into and finally approved by the Secretary of War, becoming effective September 1, 1904, wherein and whereby it was agreed in effect that while the blocks should conform to the specifications previously agreed upon, nevertheless any large block that would be as valuable or more valuable to the United States and would make the work as stable or more stable than if the dimensions conformed strictly to the letter of the specifications, would be accepted by the Government. (Transcript, p. 14, par. 60.)

Only six crest blocks were received or offered subsequent to the date of this supplemental agreement, two of which were rejected. It does not appear that any part of the $400 above mentioned was for the difference between the value of said two rejected crest blocks as crest blocks and large riprap, nor does it appear what was the reason for the rejection of said two crest blocks.

In addition to the $400 claimed and allowed, as above stated, the court finds that the rejection of the 90 stones offered as crest blocks compelled the contractor to obtain and furnish other crest blocks to take the place of those rejected, " which caused a delay of 10 days to claimant in the completion of the work." (Finding VI, Transcript, p. 24.)

The court finds that the average daily "cost" to the contractor in the performance of his contract was $162.70. (Finding 17, Transcript, p. 28.)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TRUE MERIDIAN

Of the total amount of the judgment rendered against the United States, $1,627 is for the delay aforesaid and $400 for the difference between the value of the crest blocks and large riprap. These two items are contested here by the Government. (Assignment of error 1, post, p. 22.)

The claimant began work under his contract at the outer end of the jetty, which is represented on the sketch on page 11 by the letter and figures "F-77+50," and continued his operations until about 2,100 feet of the jetty had been completed, which carried the completed work up to about the station marked "C-55." (First paragraph of Finding VI, Transcript, p. 23.) Over this entire distance the foundation of the jetty had been laid by the Aransas Pass Harbor Co. (First paragraph, Finding VII, Transcript, p. 25.) The court further finds that from station C-55 to station 27 the entire core of the structure had been built up, and between stations 27 and D-40 the crest blocks had been laid. (First paragraph, Finding VII, Transcript, p. 25.) This latter finding is irrelevant to any issue involved in this case and may be regarded as surplusage.

The court further finds, in the same paragraph, that—

> The foundation * * * thus previously constructed were fully consolidated when the contract with claimant was let.

The words "and the core" were omitted from the above-quoted sentence for the reason just stated, that no issue in this case is involved with respect to any part of the work between station "C–55" and the shore. The "foundation" referred to consisted of "a brush mattress weighed down by stone," as stated in claimant's brief (p. 2).

What the claimant was to do under his contract was to build up the core with the small riprap on this foundation, place the slope stones or large riprap thereon, and cap the same with the crest blocks and "selected" pieces of large riprap. The method or manner of placing the materials is provided for in paragraph 61 of the specifications. (Transcript, p. 6.) That part of it which is pertinent to the issues involved in this case reads as follows:

> From the vicinity of station 55 seaward the method of construction shall be as follows: A mound of small riprap shall first be built up and around the existing structure to about 1 foot elevation. *When in the judgment of the United States agent in charge this mound has become fully consolidated,* its gaps and interstices shall be filled and its crest leveled with small riprap, generally one-man stone. *Large blocks shall then* be bedded in the crest of the mound in two rows, breaking joints with their longest dimension parallel to the axis of jetty in such manner that voids under the placed blocks will be at a minimum, and side slopes and remainder of crest shall then be covered with large riprap. (Italics ours.)

The court finds that "when claimant had completed from 100 to 200 feet of the core, he requested from the inspector in charge permission to begin to lay the crest blocks, which was refused, on the ground that the core had not consolidated." The finding does not state in this connection or elsewhere when that condition was arrived at and when that request was preferred, but it must have been prior to the end of December, 1903, because in the next sentence the court finds that by the end of December, 1903, claimant had completed 400 to 500 feet of the core, when "again he requested permission to impose the crest blocks." The inspector, it is said, refused, and continued to refuse permission to lay said crest blocks until May, 1904, by which time about 1,400 or 1,500 feet of the core had been completed. The reason assigned by the inspector for refusing permission to lay said crest blocks was that the jetty had not had sufficient time to consolidate. The court says: "*It was manifest that large parts of the work done by him* (the contractor) *had fully settled and consolidated*" during and through December, 1903, and January, February, March, and April, 1904.

It is further found that it would have been advantageous to claimant to have been allowed to "impose the crest blocks on the top of the core as rapidly as possible," so that claimant would have a calm sea on the lee side of the jetty in which to moor his barges and proceed with the work. It is found that when about 300 feet of the core had been built up to the required elevation, "slope stones"—large riprap—were laid on the side of the jetty, which afforded some protection from the action of the waves to the riprap already constructed, but not as much protection as the crest blocks would have afforded. The court then finds that if the contractor had been permitted to lay the crest blocks as requested, he would have been able to work *60 days* more than he did between December, 1903, and May 7, 1904. It does not appear that the contractor ever appealed to the engineer in charge from the refusal of the inspector to grant permission to lay the crest blocks. The request was to the inspector, and the refusal was by him and him alone.

The court awarded judgment on this item for $9,762, this amount being derived from allowing the $162.70 average daily cost (Finding 17, Transcript, p. 28), for said 60 days.

This item is contested here by the Government. (Assignment of error 2, post, p. 22.)

It is also contested by the claimant on the ground that the delay was 145 days instead of 60. (First Assignment of Error, claimant's brief, p. 10.)

The contract provided that—

> Whenever the contractor furnishes board and lodging to his own employees, he shall also, if required by the engineer officer in charge, furnish suitable board and lodging to such employees of the United States as are connected with the work, all at reasonable rates satisfactory to the engineer officer in charge, to be paid for by the United States with the monthly payments. (Petition, par. 5, Transcript, p. 7.)

During the performance of this contract claimant furnished board and lodging to employees of the

United States at the request of the engineer officer in charge, and was paid therefor at the rate of $15 per month, which the court finds was—

> the usual and customary price paid by the United States for the board and lodging of its employees at other points in Texas.

The court finds further that the actual cost to the contractor of boarding *his* employees was "about $20 per month." (Finding 11, Transcript, p. 26.) Claim was made in the petition for the actual cost to the contractor of boarding each person for the United States, which was alleged to be $20 per month. The amount claimed was $130. (Petition, par. 17, Transcript, p. 18.)

The court disallowed this claim, which disallowance is assigned as error by the claimant. (Fifth assignment of error, claimant's brief, p. 10.)

The contract provides:

> "If at any time it should, in the opinion of the engineer officer in charge, become necessary to do any work * * * not herein specified for the proper completion of this contract, the contractor shall furnish the same at the current rates existing at the time of said * * * work; said current rates to be determined by the engineer officer in charge, and payment therefor to be made with the monthly payments. Such labor * * * as may be required from time to time to aid the employees of the United States in inspecting, in making supervision, or in other matters connected with the work, shall be furnished for the

> time by the contractor at cost price (as determined by the engineer officer in charge exclusive of contractor's charges for superintendence, etc.), whenever required by the United States agent in charge * * *." (Par. 42, Transcript, p. 5.)

Under this provision of the contract claimant did furnish labor called for by the United States engineer officer in charge, which labor the contractor was paying $60 per month. The United States engineer officer in charge allowed and paid him $2 per day as the "cost price" of said labor for 140 days actually thus furnished. (Finding 12, Transcript, p. 27.)

Claimant in his petition asked compensation for this labor at the rate of $6 per day on the ground that he had to pay his laborers for each calendar day, and that by reason of the interruptions to the work from the occurrence of Sundays, holidays, bad weather, and other causes which prevented them from performing labor on certain days the actual cost of the labor on the days that his employees *did* work was $6 per day per capita, and that therefore the engineer in charge should have allowed him that sum as the "cost price" of said labor. (Petition, par. 18, Transcript, p. 18.)

The court disallowed this item of the claim, and such disallowance is made the basis of the fourth error assigned by claimant. (Claimant's brief, pp. 10 and 17.)

The contract provided:

> * * * If the work is not completed within the period stipulated in the contract,

> the engineer officer in charge may, with the prior sanction of the Chief of Engineers, waive the time limit and permit the contractor to finish the work within a reasonable period to be determined by the said engineer officer in charge. Should the original time limit be thus waived, all expenses for inspection and superintendence and other actual loss and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said engineer officer in charge and deducted from any payments due or to become due to the contractor; provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as, in the judgment of the said engineer officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal forces or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable causes of delay arising through no fault of the contractor and which prevented him from commencing or completing the work or delivering the materials within the period required by the contract. (Par. 35, Transcript, p. 3.)

During the progress of the work an epidemic of yellow fever broke out in the State of Texas and a quarantine was proclaimed and enforced at San Antonio for 15 days, which prevented any stone being shipped from the quarries to Rockport. During this period of 15 days claimant's force at the quarries became disorganized and 15 days' additional time was consumed by the contractor in reorganizing his labor force and getting into condition where the shipments of stone could be resumed. In the settlement for the performance of this contract, the engineer officer in charge remitted the expenses of superintendence and inspection for 15 days, the period covered by the quarantine. (Par. 13, Transcript, p. 27.)

Claimant, in his petition, asked that the expenses of superintendence and inspection be remitted for a "period not less than one month" and that judgment be allowed him for the difference between the amount of such expense for 15 days, the period allowed by the engineer officer in charge, and 30 days, the period claimed. (Petition, par. 19, Transcript, pp. 18, 19.)

The court entered judgment in favor of the claimant for $125, for said expenses for the 15-day period aforesaid. This item is here contested by the Government. (Assignment of error 3, post, p. 22.)

Just at the commencement of the work by claimant, a tugboat chartered by him and under the pilotage of a regularly licensed pilot, was grounded on the sand bar near the site of the jetty. This accident delayed the work on the jetty 30 days. The grounding of said tugboat was not the fault of either the United States or the claimant. In the settlement for the performance of this contract the engineer officer in charge deducted $320 as expense for superintendence and inspection during said period of 30 days. (Par. 14, Transcript, p. 27.)

Claimant in his petition asked that judgment be entered in his favor for the amount of said deduction, on the ground that, under the contract, the engineer in charge "was bound to extend the time for the completion of the work one month without charging him the expenses of superintendence and inspection," on account of the grounding of said tugboat. (Petition, par. 20, Transcript, p. 19.)

The court entered judgment in favor of the claimant for said amount. (Conclusions of law, Transcript, p. 28.)

This item is contested here by the Government. (Assignment of error 3, post, p. 22.)

In the final settlement for the performance of this contract a total of $2,264.17 was deducted for the expenses of superintendence and inspection; that is to say, the engineer in charge refused to "remit" such expenses. The court apparently allows the claimant judgment for about $750 of said amount as expenses for superintendence and inspection deducted for the period of 70 days' delay charged to the Government on account of the rejection of the crest blocks and the refusal to permit the laying of crest blocks at the time requested. This item is contested by the Government for the same reason that it contests the main items of damages claimed on account of said rejection and refusal. (Assignment of errors 3, post, p. 22.)

The claimant personally superintended the work during the whole of the time it was in progress. His services "in so doing" were worth $750 per month.

The court further finds that during the period of the work he had no other employment and was not engaged in any other enterprise. (Finding 18, Transcript, p. 28.)

Claimant, in his petition, asks compensation at the rate of $800 per month for the loss of his services during a period of 4 1/10 months. (Petition, par. 23, Transcript, p. 20.)

The court apparently awarded judgment in favor of the claimant for the loss of his own services at the rate of $750 per month for the 70 days (2⅓ months) delay charged to the United States, as before stated.

This item is contested here by the Government, for the same reason that it contests the items allowed for loss of time and damages resulting from the rejection of crest blocks and the refusal to permit the laying of the same before the time stated. (Assignment of error, 4 *post*, p. 22.)

Claimant assigns error on this item in that the court should have entered judgment at the rate stated for an additional length of time, in which it is claimed the contractor was delayed by the act of the United States. (Second assignment of error, claimant's brief, pp. 10, 15.)

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

1. In rendering judgment against the United States on the facts stated in the sixth finding of fact. (Transcript, p. 23.)

2. In rendering judgment against the United States on the facts stated in the seventh finding of fact. (Transcript, p. 24.)

3. In rendering judgment against the United States on the facts stated in the thirteenth, fourteenth, and sixteenth findings of fact. (Transcript, pp. 27, 28.)

4. In rendering judgment against the United States on the facts stated in the eighteenth finding of fact. (Transcript, p. 28.)

ARGUMENT.

I.

FIRST ASSIGNMENT OF ERROR.

Rejection of the crest blocks.

The full provision of the contract with reference to the kind and character of the stones to be used in constructing the jetty is as follows:

> Small riprap shall be in pieces weighing from 10 pounds to 2 tons, but not over 25 per cent by weight shall be "one-man stone." Large riprap shall be in pieces of not less than 2 tons in weight, and the average weight shall not be less than 4 tons. Large blocks shall be granite or other rock weighing not less than 160 pounds per solid cubic foot. It shall be of good durable quality, hard, tough, sound,

> clean, of compact texture, free from loose seams and other defects. *Blocks shall be as closely rectangular in form as practicable and varying not over 6 inches from the dimensions 3½ feet by 5 feet by 8 feet. Their bed surfaces shall be as nearly plane as practicable.* (Transcript, p. 6.) (Italics ours.)

It was also provided in the second section of the formal agreement as follows:

> 2. All materials furnished and work done under this contract shall, before being accepted, be subject to a *rigid* inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final. (Transcript, p. 10.) (Italics ours.)

The dispute between the contractor and the engineer in charge with relation to the rejection of crest blocks arose primarily over the method of measurement, the contractor contending that the specifications provided for "mean" measurement, while the engineer in charge contended that they plainly required "extreme" measurement. What these two expressions mean has already been referred to in the statement of this case. It seems too plain for argument that *extreme* measurements was what was provided for in the contract. If *mean* measurements were to be adopted, a stone might be 12 feet long at its greatest length and only 5 feet at its shortest, and yet vary not over 6 inches from the required length, 8 feet. Likewise, it might be 8 feet wide at its greatest width and only 2 feet wide at its narrowest width, and yet its mean width would not vary over 6 inches from the required width of 5 feet, and so as to its thickness. In order to determine whether a given stone varied not more than 6 inches from the specified dimensions, it was absolutely necessary that its maximum and minimum length, breadth, and thickness be measured. It does not seem necessary to look further than to the contract itself to reach this conclusion.

But it is not found by the court, and it was not a fact, that all of the 90 stones rejected were rejected merely because they varied more than 6 inches from the specified dimensions. Those dimensions were a prerequisite in all cases; but there was something more. The stone had to be "as closely rectangular in shape as practicable." A stone might come within the specified dimensions and yet not conform to the requirement as to shape. For instance, a stone which was 5 feet 6 inches at one end on the top surface and 4 feet 6 inches at the same end on the bottom surface, and vice versa at the other end, would not be as "closely rectangular as practicable."

Again, stones were not only required to conform to the specific dimensions and be as closely rectangular in shape as practicable, but their bed surfaces were to be "as nearly *plane* as practicable." The purpose of this latter provision will be apparent when it is called to mind that these blocks were to be laid along the crest of a core built up from the bottom of the sea by small riprap. That is the reason they are called crest blocks in the specifications. If they were not "as nearly plane as practicable" on the under surface, difficulty would be encountered in getting them to lie firmly on the core. The evident purpose of these requirements as to the size and shape of the crest blocks was to secure uniformity and evenness in the finished top of the jetty.

But whether the stones in question were rejected because they varied more than 6 inches from the specified dimensions, or whether they were rejected because they were not as closely rectangular as practicable, or because their bed surfaces were not as nearly plane as practicable, makes no difference. The fact still remains that the rejections were made by the United States agents in the performance of their duty and, so far as the findings show, in strict conformity with the provisions of the contract. There is no finding by the court that the stones rejected did *not* conform to the specifications. There is no finding that the decision of the engineer in charge or of his inspector was fraudulent, or that there was bad faith in any form whatever. There is nothing found from which error can be inferred, not even the slightest error, let alone error gross enough to necessarily imply bad faith. It was the duty of the inspector to reject all stones which did not come within the specifications. The decision of the engineer officer in charge as to "quality"—that is, the dimensions and other requirements as to the shape of the stones—was to be final, under the contract. Under these circumstances, the action of the officers and agents of the United States in the premises will not be disturbed by the court.

United States v. *Barlow* (184 U. S., 123, 133); *Gleason and Gosnell* v. *The United States* (175 U. S., 588, 607); *Railroad Company* v. *Price* (138 U. S., 185, 195); *Railroad Company* v. *March* (114 U. S., 549, 553); *Kihlberg* v. *The United States* (97 U. S., 398, 401); *McLaughlin* v. *The United States* (37 C. Cls. R., 150, 188); *Electric Fire Proofing Co.* v. *The United States* (39 C. Cls., 307); *Zimmerman* v. *The United States* (43 C. Cls. R., 525, 564); *Bowe* v. *The United States* (42 Fed. Rep., 761, 778–780); *Ogden* v. *The United States* (60 Fed. R., 725, 727); *Sweet* v. *Morrison et al* (116 N. Y., 19, 34); *Railroad Co.* v. *Brydon* (65 Md., 198, 220); *Gilmore* v. *Courtney* (158 Ill., 432, 437); *Sanders* v. *Hutchinson* (26 Ill. App., 633, 638); *Gregory, the engineer as arbitrator between the employer and contractor* (1901), p. 56; *Hudson on Building Contracts,* p. 358.

The court did not find that there was any mistake made in reducing the contract in suit to writing, either by the omission or misuse of words or phrases. It did not therefore "re-form" the contract. It did, however, incorporate in its findings a letter from the claimant to the engineer officer complaining about the rejection of crest blocks, in which he stated that he knew it was not contemplated that a slight variation from the exact dimensions given in the specifications should cause the rejection of a stone, if it was as valuable for the purpose for which it was intended as if it had been within the precise limits of the dimensions. These are not his words, but this is the substance of his statement. (Transcript, p. 24.)

It should be remembered, in this connection, that Mr. Ripley assisted in the preparation of the specification in question, which was unusual. While it is not stated in the record, we deem it not inappropriate to explain that Mr. Ripley had for many years been an assistant engineer for the United States located at Galveston, Tex., and had been connected as a consulting engineer with the improvements being made by the Aransas Pass Harbor Co. He had severed his connection with the Government, and was engaged in contracting. It was his expressed purpose to bid upon the work which the Government had undertaken to do in completing the Aransas Pass jetty. Because of this and his familiarity with that work, and with the methods in the engineer's office, he was invited to assist and did assist in the preparation of the specifications. The purpose and intent of the engineer officer, and of Mr. Ripley as well, was evidently to make the specifications conform as nearly as practicable to the specifications in vogue during the operations of the Aransas Pass Harbor Co. The design—that is, the general shape and location of the work—did conform precisely.

In the specifications of the Aransas Pass Harbor Co. the dimensions of the large blocks of stone were not specified. (Transcript, p. 3.) In the specifications forming a part of the contract sued upon in the case at bar, those dimensions were specifically set forth, as indicated above. Presumably, this feature was as good as written by Mr. Ripley himself.

It should be also noted that when he and Prof. Haupt were stating their objections to the specifications published October 10, 1902, nothing was said about the provision in question not being in conformity with the Aransas Pass Harbor Co.'s specifications with reference to the crest blocks. As intelligent men they must have known that the contract specifications did not justify or permit the acceptance of stones which conformed to the specification in the Aransas Pass Harbor Co.'s contract, as stated on page 3 of the Transcript. It is fair to assume that the motive for making the contract specifications as to the size, shape, and dimensions of the crest blocks definite and certain, was to secure a more uniform, compact, and smooth top to the jetty. That certainly was the effect, and Mr. Ripley having contributed his services to the preparation in the first instance of such a specification, and having neglected to state any objections to its presence in the specifications at the time he was engaged in the business of objecting—that is to say, before he submitted his bid—he ought not now to be heard to complain or to urge that he assumed the specifications would not be observed by the United States agents. In short, he has absolutely no ground upon which to base a charge that it was intended to so write or interpret this provision of the specifications as to permit the acceptance of blocks varying in size "from 2 to 5 tons" and weighing "not less than 135 pounds per cubic foot dry," which latter provisions were those made in the Aransas Pass Harbor Co.'s specifications.

That the authorities of the United States did not admit there was any mistake made in reducing these provisions to writing, or in the interpretation and application thereof, is self-evident from the fact that they would not accept any stone as "valuable or more valuable to the Government," and which would make the work "as stable or more stable than if the dimensions conformed strictly to the letter of the specifications," *until* a contract formally entered into providing for such modification had been finally approved.

In short, there was no mutual mistake made in reducing this contract to writing, consequently there was nothing to reform. (*United States* v. *Milliken Imprinting Company,* 202 U. S., 168, 177; *Boston Iron Works* v. *The United States,* 34 C. Cls. R., 174; *Cullinane* v. *The United States,* 18 C. Cls. R., 577; *Harvey* v. *The United States,* 13 C. Cls. R., 322; *Ellicott Machine Co.* v. *The United States,* 44 C. Cls. R., 127, 130.)

The terms of the specifications are plain and unambiguous. It is impossible to find anything therein, or anywhere in the contract, from which it can be inferred that any other meaning than that conveyed by the exact words and figures used was intended. If the contract did not express the agreement of the parties and the true intent or understanding of the claimant, it was "his folly to have signed it." (*Brawley* v. *The United States,* 96 U. S., 168.)

It may be contended that the size, shape, and dimensions of the crest blocks as set forth in the contract specifications should be interpreted to mean the same as the specifications in the Aransas Pass Harbor Co.'s contracts (Transcript, p. 3) because the appropriation act provided that the work should be done "in accordance with the design and specification of the Aransas Pass Harbor Co." and because the contract provided that nothing in the specifications should "be interpreted as violating any of the requirements and provisions" of said part of said act.

A sufficient answer to this contention was made by the Court of Claims upon its first consideration of this case, wherein it was held that the claimant having consented to the contract made and having performed the work thereunder and been paid therefor, no fraud or gross error being charged, it was too late for him to raise objections to the specifications as being contrary to the requirements of the act in question and the specifications of the Aransas Pass Harbor Co. (43 C. Cls. R., 490, 496.)

The rule that contracts are to be most strictly construed against those who draw the same does not militate against the United States in this case, because, as has been pointed out, the claimant himself collaborated with the agents of the United States in preparing the contract.

For the reasons stated the judgment of the Court of Claims on this item should be reversed.

II.

SECOND ASSIGNMENT OF ERROR.

Refusal to permit the laying of crest blocks.

The manner of performing the work of constructing this jetty was provided for in the sixty-first paragraph of the specifications and is set forth in full in the statement of the case (ante, p. 13).

From these provisions of the contract it is as clear as language could make it that the time and manner of laying the crest blocks on the work was a matter entirely within the judgment of the United States agent. Claimant agreed to this, and all that he could expect and all that he was entitled to was the honest and unbiased judgment of the agent of the United States.

The court finds that after he had completed from 100 to 200 feet of the core he requested permission to begin laying the crest blocks, which was refused, on the ground that the core had not consolidated. This was some time before the end of December, 1903. He continued from time to time to make such requests, but was not permitted to begin laying said crest blocks until the first part of May, 1904, when such permission was granted. The court further finds that the only reason at any time given by the inspector for refusing to permit the laying of the crest blocks was that the jetty had not had sufficient time to consolidate. It seems to us that this was reason sufficient, and, unless the judgment of the inspector was dishonestly, fraudulently, or capriciously exercised, claimant has no right, under the law of the contract, to complain thereof. (See the cases cited under the preceding title.)

There is a finding by the court that during the time the inspector was refusing permission to lay said slope stones "it was manifest that large parts of the work done by him had sufficiently settled and consolidated." This finding, we submit, is not sufficient to constitute a finding of bad faith, fraud, or caprice, nor is it a finding of such gross error as necessarily implies bad faith. In effect it is merely an expression of the opinion of the court that because of the lapse of time the "core" of the jetty must have settled sufficiently to have warranted the laying of crest blocks. We think that it was not competent for the court to express such a view in its findings of fact. The inspector, who was a civil engineer, was on the ground. His judgment as to the matter committed to him was more likely to be correct than that of the court, which was 2,000 miles away from the site of the jetty and which passed judgment upon the matter five or six years after the event. It is possible, of course, that the inspector was mistaken; that he withheld his permission longer than was necessary; but this does not warrant the imputation of bad faith to him, nor does the possibility of his being mistaken about it justify the conclusion that he was grossly in error. Certainly the mere statement by the court in its findings that "it was manifest" that the core had settled or consolidated sufficiently to permit the laying of crest blocks is not a finding of bad faith or such gross error as to necessarily imply bad faith.

But there is another and all-sufficient reason why the claimant can not now be heard to complain of the inspector's refusal, in that he did not complain of it at the time. There is no finding of fact by the court that the refusal of the inspector was ever appealed from or that any attempt was made in any form whatever to have the engineer in charge overrule him in the matter. The absence of such a finding is conclusive of the fact that no objection, protest, or appeal was presented to the engineer in charge or to the chief of engineers. (*Sun Mutual Insurance Co.* v. *Ocean Insurance Co.*, 107 U. S., 485, 500.) If the claimant felt that this refusal to permit the laying of crest blocks was a violation of the contract, or that the inspector was acting in an arbitrary or capricious manner in so refusing, the way was open for him to appeal to the engineer in charge. (Contract, par. 2, Transcript, p. 10.) He did not do so, and it would seem that he ought to be estopped from now complaining. His failure to protest or to seek in any way to have the inspector overruled in the matter was an acquiescence in his conduct. (*Lewman* v. *The United States*, 41 C. Cls. R., 470, 475; *Hawkins* v. *The United States*, 96 U. S., 689; *Bowe* v. *The United States*, 42 Fed. Rep., 761, 778.)

The case of *Madison J. Bray, Trustee, etc.*, v. *The United States* (No. 22954, Court of Claims), decided February 13, 1911, involves the identical points at issue here. The facts in the Bray case are a little more favorable to claimant than in the case at bar, in that it there appears the contractor did protest to the local engineer, at least, while in the case at bar the objection or protest was confined to the inspector at the site of the work.

The court, in its opinion, said:

> The findings show that while the contract company protested both to the inspector and the local engineer against being compelled to lay the cement masonry as it was required to do, it never lodged any such protest with Maj. Bixby, the engineer officer in charge of the work. The specification made the latter officer the final arbiter "upon all matters relating to the work and upon all questions arising out of the specifications." It will thus be seen that the contract provided a forum where the contract company could have gone and presented its grievances, but it failed to do so. We do not think it can now be heard for the first time to present these grievances in this court. (*Bowe* v. *The United States*, 42 Fed. Rep., 761; *Bigelow on Estoppel*, p. 633.)

If we are right in either view of this matter, that is to say, if the judgment of the inspector was honestly exercised and was not so grossly in error as to imply bad faith, or if the failure to appeal from his decision to the engineer in charge necessarily implies an acquiescence in his decision, the judgment of the Court of Claims on this item should be reversed.

The claimant assigns error on this item upon the ground that it appears from the findings that the delay caused by the refusal of the inspector to permit the laying of crest blocks during the period indicated was not 60 days but 145 days, and that, therefore, the judgment should be $23,591.50 instead of $9,762. The court finds that if claimant had been permitted to begin laying crest blocks when he first asked permission he would have been able to work 60 days more than he did between that time and May 7, the date on which the first crest blocks were laid. Inferentially then, this refusal did not delay the work a single day *after* the 7th of May, 1904. How then can it be said that but for the refusal aforesaid the work might have been completed 145 days earlier than it was? It is argued (claimant's brief, p. 14) that if claimant had not been delayed by reason of the rejection of the crest blocks and the refusal to permit the laying of crest blocks, he would have been able to finish the work 12 days before the 7th of May, or by April 25, 1904. This argument is predicated upon the fact that the actual working days subsequent to May 7 were only 58, 12 less than the number of days the court finds the Government delayed the contractor, and that, therefore, the real and actual result of the delay charged to the Government was to postpone the completion of the work from April 25 to September 17, 1904, a total of 145 days. This conclusion, we submit, is purely speculative, and not supported by any finding of fact made by the court below.

For the reasons heretofore stated, we do not think the Government is chargeable with any delay whatever; but if it is it can only be for the number of days which the court finds the particular acts complained of delayed the work. The finding is for 70 days all told. That is an "ultimate" fact which it is well settled this court will not go behind.

III.

Board and lodging.

The contract provision with relation to board and lodging is set forth in full in the statement of the case for the United States (ante, p. 15).

Acting under the authority of said provision of the contract, the engineer officer in charge requested claimant to furnish board and lodging for certain employees of the United States engaged on the work as inspectors, and in the monthly settlements had with claimant for the performance of the contract payment was made to the claimant for the board and lodging of said employees at the rate of $15 per month.

It does not appear from the finding that any objection or protest was made at that time by the claimant to the amount thus allowed. It was the usual and customary price paid by the United States for board and lodging of its employees at other points in Texas. There was no other place at which the employees of the United States could be conveniently lodged or boarded. Claimant had erected temporary quarters on shore and established a commissary department for his own convenience. He says, and the court sustains his statement, that it actually cost him "about $20 per month" to board his employees. The court does not find the number of months' board furnished. This may be determined, however, by the amount paid under the allowance made by the engineer from month to month, which the court finds to have been $261.50. The allowance being at $15 per month, we find that about 17½ months were paid for. If the claimant is now entitled to "about" $5 per month additional, he would be entitled to "about" $87.50. The court disallowed this item, and such disallowance is now made the basis of the claimant's fifth assignment of error. (Claimant's brief, p. 18.)

The principle of law which runs through the cases cited in connection with the first and second assignments of error is applicable here. The rates to be paid for board and lodging were to be "*reasonable rates satisfactory to the engineer in charge.*" What was the customary and usual price paid by the United States for board and lodging under similar circumstances was certainly a "reasonable" rate. The court has not found that it was not a reasonable rate nor has it found anything which in the slightest degree tends to show that in fixing that rate, in determining what was "satisfactory" to him the engineer acted in bad faith. Certainly it can not be said that by allowing $15 per month when the actual cost was "about $20 per month" he committed such gross error as to necessarily imply fraud or bad faith, especially when it does not appear that claimant informed him at the time of the so-called actual cost. If the claimant was not satisfied with the allowance made by the engineer the time for him to complain was when it was made. There is nothing in the finding to show that he ever, until the filing of the petition in this case, found any fault with this allowance. His silence at that time must be regarded as an acquiescence in the action of the engineer (Lewman and other cases cited, ante, p. 33). The judgment of the Court of Claims on this item should be affirmed.

IV.

Cost of labor.

The provision of the contract under which labor was furnished by claimant is quoted in the statement of the case for the United States (ante, p. 16).

The labor which the United States engineer required was used in making necessary soundings and surveys to determine the amount of work done by the contractor, etc. This labor was called for, of course, only on days when such work was to be done and the "weather permitted." If the weather was too bad for the United States to work on these matters it was too bad for the contractor to work. Consequently it happened that the contractor lost the services of certain of his employees on days when he could have used them. The gist of claimant's contention is that he was paying these men $2 per day for each calendar day, and inasmuch as they only worked about one day in three, the actual labor performed was costing him $6 per day, and, therefore, the United States engineer in determining the "cost price" of said labor, should have taken the $6 per day as the basis.

The court disallowed this claim, which disallowance is made the basis of the fourth assignment of error by claimant. (Claimant's brief, p. 17.)

Payments were made for this labor along with the monthly settlements. There is nothing in the finding to indicate that at the time the claimant made any objection or protest on account of the allowance being only $2 per day for labor. In fact there is nothing to show that he ever, until the filing of the petition in this case, claimed the additional $4 per day for such labor. For the reasons stated in connection with the preceding items the judgment of the court on this item should be affirmed.

V.

Remission of inspection charges on account of yellow-fever quarantine.

The provision of the contract with relation to the extension of time and the remission of the expenses of superintendence of and inspection charges, etc., is quoted in full in the statement of the case for the United States (ante, p. 17).

The quarries from which the stones to construct this jetty were obtained were so located that the stones had to be hauled through the city of San Antonio. The quarantine at San Antonio against the yellow fever lasted exactly 15 days. During this time no shipments could be made. During this period the claimant says, and the court supports him in its finding, his labor force at the quarries became disorganized, and after the quarantine was lifted it took him about 15 days to get his men back to work and to get stones going forward to Rockport again.

When it came to making the final settlement for this work the engineer in charge, in computing the amount of deductions which should be made on account of the expense of superintendence and inspection, remitted only $125, the amount of such expenses for the period of 15 days, whereas the claimant insisted and still insists that the actual loss of time to him on account of the yellow-fever quarantine was 30 days. The court apparently agrees with his contention, for it allowed him judgment for $125, being the amount which the engineer refused to remit on account of the additional 15 days' loss of time claimed.

It will be observed that the contract did not give the claimant any absolute right to demand or compel the remission of the cost of superintendence and inspection for a single day on any account. The whole matter is there left to the discretion of the officer in charge, who *may*, with the prior sanction of the Chief of Engineers, *waive the time limit*. The engineer would have been entirely within his rights under the contract if he had refused to remit those expenses for any part of the time covered by this quarantine. Having once decided to waive the time limit, it was made his contract duty to remit said expenses for that period. But under the principle of law running through the cases heretofore cited, it was not competent for the Court of Claims to review or revise in any way the action of the engineer in the premises. There is no allegation of positive fraud in refusing to remit the expenses for more than 15 days on this account; there is no finding of the court of positive or constructive fraud, but even if there had been allegation, proof, and a finding that the refusal was capricious and arbitrary, the claimant would have no remedy, for it was not mandatory on the engineer to waive the time limit on any account.

For these reasons the judgment of the Court of Claims on this item should be reversed.

VI.

Remission of inspection charges on account of the grounding of a tug.

This item of $320 is in the same class as the preceding one (Finding XVI, Transcript, p. 27). The tugboat in question was chartered by claimant and was proceeding to the site of the work when it grounded on a sand bar. As the court well says in the finding, this was not the fault of the United States nor was it due to any fault or negligence on the part of the claimant. The tug was in charge of a regular licensed pilot and presumably it was his fault, but so far as the real issue with respect to this item is concerned it makes no difference whose fault it was. The engineer in charge in making the final settlement for the work declined to extend the time and remit the supervision and inspection expenses for any part of this 30 days. His refusal was final and conclusive. (See authorities heretofore cited.) For these reasons the judgment of the Court of Claims on this item should be reversed.

VII.

Remission of inspection charges on account of delay caused by the United States.

This is a part of the item of $2,302.32, now claimed. (Claimant's third assignment of error, brief, p. 15.)

It appears from the sixteenth finding (Transcript, p. 28) that the Court of Claims allowed, in addition to the two preceding items of $125 and $320, respectively, $748.05 as the amount of the expenses of superintendence and inspection for the 70 days' delay charged by the court to the United States on account of the rejection of the crest blocks and the refusal of permission to begin laying the same at the time requested.

The claimant assigns error on this allowance, because he says the time should have been extended and consequently the expenses of superintendence and expenses remitted for a total period of 145 days instead of 70.

The Government contests this allowance and assigns error thereon (third assignment of error, ante, p. 22) on the ground already stated in connection with the two preceding items and for the further reason that the acts of the United States agent in rejecting the crest blocks and refusing permission to lay the same were in no sense a breach of the contract. (See items 1 and 2, ante, pp. 22, 31.) For the reasons there stated the judgment of the Court of Claims on this item should be reversed and the court directed to render judgment in favor of the United States on the findings made.

VIII.

Claimant's loss of time.

The court's Finding XVIII (p. 28) does not make it clear just what it intended to allow on this item. It fixes the value of claimant's personal services at $750 per month and then stops with the statement that at the time he had no other enterprise under way and was not employed in any other business than superintending the work of construction under this contract. From the tenor of this finding it might be inferred that judgment had not been entered in favor of the claimant on this particular item. However, it is mentioned, in the conclusion of law, as one of the items on which the total amount of judgment is based, and by a computation outside of the record it is found that the court allowed claimant $750 per month for two and one-tenth months, the time which it found he was delayed by reason of the rejection of the crest blocks and the refusal to permit the laying of the same. (Items 1 and 2.)

Claimant assigns error on this item on the grounds that the allowance should have been $750 per month for four and five-sixths months, or the 145 days' delay claimed. (Claimant's second assignment of error, brief, p. 15.)

The United States assigns error on this item on the ground that there was no breach of contract on the part of the United States in rejecting the crest blocks or refusing permission to begin laying the same.

The judgment of the Court of Claims on this item should be reversed and the court directed to render judgment in favor of defendant.

For the reasons stated in connection with the discussion of the assignments of error of the respective parties here, we submit that the judgment of the Court of Claims should have been in favor of the United States upon each of the items of the claim in issue, and the petition dismissed. The judgment of the Court of Claims should, therefore, be reversed with instructions to dismiss the petition.

John Q. Thompson,
Assistant Attorney General.

Philip M. Ashford,
Attorney.

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We would content ourselves with what has been said on this subject in the brief for the United States, page 2, were it not for the fact that counsel for claimant have dragged into this controversy a finding which they seek to construe as evidence of "malice." We refer to finding IX, transcript, page 26. The Court of Claims allowed nothing on this finding, and its failure to do so has not been assigned as error by the claimant.

In the first place, counsel, in their statement, are apparently laboring under a misapprehension as to what class "the large pieces of riprap selected for use at the sides of the crest blocks" belonged. They seem to have the impression that these were "slope stones." They were not. As counsel stated (reply brief, p. 1), claimant was *permitted* to lay slope stones before laying crest blocks. The selected pieces were to fit in the triangular space which would be left between the upper end of the slope stones and the side of the crest blocks, when they should be laid. They were to be paid for under the contract at $4.25 per ton, while the slope stones were to be paid for at $4.60 per ton. These stones were necessarily of odd shape, being practically triangular and would fit in the space so left, as above indicated, like an inverted pyramid. Necessarily such pieces had to be "selected," as the other stones were quarried and as they happened to appear in the process of getting them out. Otherwise special means would have been necessary to quarry them. They could not be used, of course, until the crest blocks were laid. Consequently, when they were "selected" and brought to the site of the jetty they had to be stored there or somewhere else until the crest blocks were laid. Claimant wanted to store them on the jetty, but insisted that if the waves washed them off to the side of the jetty, he should be paid for them as large riprap, because, he said, they would take the place of large riprap. The inspector and engineer in charge informed him that if he "stored" these selected pieces on the jetty, he must take the risk of the loss of the same; that he would not pay for them as large riprap, in which he was entirely justified for two reasons:

First, because large riprap was to be paid for at \$4.60 per ton, while the selected pieces were to be only \$4.25 per ton, and—

Secondly, because of a contract provision (par. 43 of the specifications) not incorporated by the court in its findings or set forth in the petition, but which we will take the liberty of here quoting so much of as applies to the subject of this discussion:

> The United States will not be responsible for the safety of the contractor's employees, plant, or *materials,* nor for the damage done by or to them from any source or cause. * * * The decision of said officer as to matters of this character shall be final.

If this item of damages for alleged loss of time was an issue, it would have been necessary for us to have suggested a diminution of the record and brought before the court in due form the paragraph of the specifications above quoted, but inasmuch as no assignment of error was made by claimant on this item, it was not deemed necessary to further delay the disposition of this case by such a proceeding. It will not be questioned that the contract in suit contains the above-quoted provision, in view of which fact it does not seem to us that the action of the engineer or his inspector in the premises sustains the insinuation that those officers were seeking to harass and obstruct the claimant in the performance of his contract because of any opposition to the design or plan upon which the jetty was being built, or for any other reason.

DEFENDANT'S FIRST ASSIGNMENT OF ERROR.

We do not desire to add anything to what has already been said in support of this assignment of error in the brief for the United States, pages 22 to 30.

DEFENDANT'S SECOND ASSIGNMENT OF ERROR.

Claimant's counsel have no right to say that "about two months" after the 18th of August, 1903, the inspector refused the contractor permission to lay the crest blocks upon that portion of the core which he had first completed. The court did not so find. As pointed out in our original brief, the court did not state when the first refusal occurred. It is not improper, we take it, to say that there was a complete variance between the testimony submitted on this subject on behalf of the claimant and that on behalf of the defendants. It was the end of December, according to the finding, before as much as 400 feet of the core had been built up, but it must be remembered that at this time the contractor had been "permitted," not *required,* to lay some slope stones, which afforded protection to the core itself and some protection to the plant of the contractor. (Finding VII, transcript, p. 25). It is not fair, therefore, to say that the request to lay crest blocks was made as early as October 18. It was at least a month and a half later. But that is not a matter of much importance. The tendency of it is to strengthen the argument used here and in the Court of Claims, by the claimant, that so much time having elapsed after the core was built up it must have fully consolidated long before May, 1904, when permission was first granted to lay the crest blocks. The longer the period of time the core was built, ready for the crest blocks, as far as its elevation was concerned, the more forcible this argument. In this aspect it is important to claimant to have the earliest date possible fixed for the beginning of the time when the core was built up.

Upon the subject of the legal effect of the court's finding that it was "manifest" that the core had fully settled and consolidated, we do not care to say anything further than was said in the original brief (p. 32). Counsel for claimant have in a very adroit way brought before this court the alleged substance of the testimony of certain witnesses called on behalf of claimant. (Claimant's reply brief, p. 6.) We will not transgress the rule further than to say that no witness called in behalf of the claimant, save the claimant himself, his son, and Prof. Haupt, all interested parties, testified on this subject, and the substance of their testimony was that the core must have fully settled and consolidated, because it had had time to do so. The Court of Claims was evidently impressed with this sort of testimony, for it found that "manifestly" the core had fully consolidated before permission to lay crest blocks was granted. If there had been positive and definite testimony based upon a physical examination of the core to the effect that it had fully settled in December, 1903, or January, February, March, or April, 1904, the court would have said so. But it evidently fell into the same mode of expression as that used in the argument by said interested parties and by counsel for claimant that it must have settled—it couldn't have helped being settled fully and completely, in view of the lapse of time.

The language employed by counsel (reply brief, p. 6) would seem to imply that the inspector or engineer in charge compelled or directed that claimant proceed to build up 1,400 feet of the core of the jetty before he was given permission to lay the crest blocks. There is no finding of fact to justify such an inference. The naked finding is that between fourteen and fifteen hundred feet of core had been completed before that time. It is fully as fair for us to infer that it was done by the contractor of his own volition or at his own request. Likewise with reference to the laying of slope stones more than

300 feet in advance of crest blocks. Counsel for claimant say in their reply brief that he was "permitted" to do this. In that they are exactly correct.

The suggestion that the "United States agent in charge" referred to in the sixty-first paragraph of the specifications, transcript, page 6, was none other than the "inspector" on the site of the jetty is in error. We think that it is perfectly clear that the inspector was not the agent of the United States "in charge." The engineer officer is the person in charge of the work and it would be an anomalous condition if a subordinate of his could be the final judge as to any part of the work. But whether, under the contract, he was the party who was to be the final arbiter in the matter or not, the claimant has made him so and we submit that the findings show as clearly and conclusively as if the statement was therein made in so many words that there was *no* appeal from the action of the inspector, and *no* protest or objection filed thereto with the engineer officer in charge. (See original brief, p. 33.)

We come now to the question of the extent of the delay found by the court and the amount of damages awarded therefor. On this subject counsel for claimant make a new and novel argument, to wit, that in ascertaining the average daily cost of performing this contract, the court should have used as the divisor the number of days actually worked, instead of the number of days from the beginning to completion of said work.

If the United States had been the cause of the contractor's failure to perform work on every day that he did not work, there might be some reason for the claim that the cost per day of doing the work should be based upon the days when work was actually performed. But it should be remembered that when claimant took this contract he understood that he could not work on Sundays and holidays, and, knowing the climatic conditions prevailing in the region where the work was to be done, he knew there would be a number of days each month when the weather would not permit work to be done. The number of Sundays and holidays he could figure upon with some certainty, but the number of days on which he would be prevented from working by bad weather, etc., he must necessarily estimate. He knew, of course, when he made his bid that he must employ his help, charter his tug, etc., and incur expenses therefor on the days when he was not working as well as days when he was working, and he made his bid accordingly. At least it is fair to assume that he did. It necessarily follows that in ascertaining the average daily cost of doing the work the days when no work was done must be taken into account the same as the days on which work was done. Therefore the whole number of days between the beginning and end of the work—392—was properly used as the divisor in ascertaining the cost of doing the work, exclusive of materials. Multiplying the quotient so obtained by the number of days the Government delayed the contractor is, it seems to us, the only fair and reasonable way of measuring the damage done by such delay. In making this statement we are assuming, for the sake of argument only, that there was a delay for which the United States was responsible.

Counsel insist that there is not the slightest element of speculation in their calculation as to the time when the claimant would have finished the work if he had not been prevented by these alleged delays of the Government. We think there is a very considerable element of speculation in it. In the petition, paragraph 9, transcript, page 15, claimant alleges that but for the interruption to the work during the six months following November 1, 1903, on account of the rejection of the crest blocks and the refusal to permit the laying of crest blocks, he would have been able to work ten days per month more than he did work. Giving the claimant the advantage of every doubt, we find that between August 18, 1903, and May 1, 1904, he worked 73 days. This number of days is arrived at by subtracting the 58 days on which the court says work was performed subsequent to April 30, 1904, from the total number of days worked. (Finding 17, transcript, p. 28.) That is to say, the first 8½ months when the winter season and much bad weather was necessarily encountered, he worked 8½ days per month. Now, after the first of May he had the benefit of the protection afforded by the crest blocks, as well as the summer months to work in, and we would naturally expect that the number of days work would jump from 8½ to 18½, but we find that in the 4½ months from May 1 to September 17 he worked an average of only 12 and a fraction days per month, so it is apparent that the laying of the crest blocks in November or December, 1903, would not have increased the number of days work in those months more than it did increase in June, July, or August, 1904, after the laying of the crest blocks had begun. There can be no absolute certainty about when the work would have been completed, but it is, we think, reasonably clear, that a delay of 60 days prior to April 25, 1904, did not cause the further delay of 145 after that time.

DEFENDANTS' THIRD AND FOURTH ASSIGNMENTS OF ERROR.

As to these assignments of error, we do not desire to say anything in addition to that contained in our original brief. Speaking, however, with reference to the deduction for superintendence and inspection expenses, we will add that while under the law of the contract the engineer officer in charge was not bound to waive the time limit or remit the inspection charges for any part of the delay caused by the yellow-fever epidemic, or other causes not the fault of the contractor, he was in all good conscience and equity bound to remit such charges for any delay which the United States had caused. The engineer officer in charge, of course, did not concede any delay on the part of the United States on any account whatever. The Court of Claims has found, nevertheless, that the United States did delay the work 70 days all told. If this honorable court affirms the judgment of the Court of Claims on those findings, or grants an additional amount of delay, as contended for by claimant's counsel, it will, of course, follow that the inspection charges deducted for that period of delay should be "remitted" by the court.

Counsel, in their conclusion, refer to the fact that throughout our brief not one word is said in explanation of the assessment of inspection charges during the delay resulting from the "refusal of that core to consolidate." They say that obviously this could not have been the claimant's fault. Certainly not. It was one of the incidents of the contract. It was to be expected that some time would necessarily elapse before the core would consolidate. In addition to that, claimant was not prevented from working at other parts of the work by reason of the "refusal" of the core to consolidate. He was permitted to go ahead and lay additional core and slope stones. The substance finding of the court is that if the crest blocks had been laid he could have done 60 days more of that kind of work within the first six months than he did. In this conclusion we think the Court of Claims is mistaken; but since it has found 60 days' delay chargeable to the United States on this account, we are bound by it, and so is the claimant.

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Assistant Attorney General.

Philip M. Ashford,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

HENRY C. RIPLEY, *Appellant*, *v.* THE UNITED STATES, *Appellee*.	No. 887.
THE UNITED STATES, *Appellant*, *v.* HENRY C. RIPLEY, *Appellee*.	No. 888.

On Appeal from the Court of Claims

REPLY BRIEF FOR APPELLANT RIPLEY

WM. H. ROBESON,
Attorney for Appellant.

BENJ. CARTER,
F. CARTER POPE,
Of Counsel.

W. F. ROBERTS COMPANY, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

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v.
THE UNITED STATES, *Appellee.*
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THE UNITED STATES, *Appellant,*
v.
HENRY C. RIPLEY, *Appellee.*
No. 888.

ON APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR CLAIMANT.

The brief filed for the Government demands of us in the first place a vindication of that resume of the facts of the case with which our brief commences. Our statement of the facts, of course, was not offered as a transcript of the findings made by the court. We respectfully insist, however, that it does not in any essential go outside the plain intent of that condensed narrative. Even on the unimportant question whether claimant "had scarcely entered upon the fulfillment of his contract" when his harassment and obstruction by the representative of the United States in charge began, the findings are as clear as claimant has any reason to wish them. Below are the details of our proposition as found by the court:

Claimant, after repairing his tug, actually entered upon the execution of his contract on August 18, 1903. About two months later the inspector refused him permission to lay the crest blocks upon that portion of the core he had first completed, though it was manifest that it had fully settled and consolidated. Within these two months, however, claimant was permitted to lay some of the slope stones. But those had to be brought to the site of the work before they could be laid. The accumulation of slope stones or "large pieces of riprap" was necessarily almost coincident with the placing of the material in the core; yet when claimant undertook to store them on the work until they should be needed the inspector stepped in and, by construing the word "expense" to include "risk" and announcing that claimant would not be paid for any of the stones that might be dislodged and fall down the sides of the jetty (though they would there serve the purpose for which they and the other riprap were brought to the work) compelled him to store them on the shore, some distance away, and thereby added considerably to the cost of the work.

Necessarily the work was at a very early stage when the inspector rejected claimant's proposition that the stones be selected at the quarry, he (claimant) bearing the expense. (Finding IX, Transcript, p. 26.)

Defendant's First Specification of Error.

The first error which counsel for the United States asks this court to find in the judgment is in the matter of the crest blocks at first rejected by the inspector but afterward, as a rule, accepted and used. It is true, as stated by counsel, at pages 7 to 9 of their brief, that the subject of the dispute between claimant and the Government's officers was the method of measuring the blocks. Since the specifications required in the stones a certain weight per cubic foot and since the cubic contents could not be calculated except from mean measurements, claimant contended that by the very letter of his specifications (regardless of the character of stones used on the previous work of the Aransas Pass Harbor Company) the mean dimensions of the stones should be the test; that this test would not admit any blocks of bad shape because the specifications also required approximate rectangularity. The Court of Claims in its Finding VI (Transcript, p. 24) sets out claimant's letter of May 22, 1904, in which he says that the test applied by the inspector was not contemplated at the outset; and there is not a word in the findings to contradict this assertion.

But there are also to be considered the specifications of the Aransas Pass Harbor Company, by which, under the terms of the appropriation for claimant's work, his specifications were dominated. The particular paragraph of the earlier specifications with which we are here concerned appears at page 3 of the transcript, headed "Blocks." That required, as assurance of fit stones for this final and most important stage of the work, a certain specific gravity and a certain bulk, nothing more. In so far as they did not clash with the specifications of the Aransas Pass Harbor Company, and no farther, the specifications of claimant's contract were valid. Their requirement of certain dimensions was not irreconcileable with the former specifications; it was a mere detail by which, with the aid of the detail as to specific gravity, to require stones of the bulk for which the old paragraph called, viz., two to five tons weight. But if these new specifications are to be construed as making the fitness of the stones to turn on their *extreme* measurements (which could have no relevancy to their weight per cubic foot) they introduced a feature which is not merely not included in, but is antagonistic to the earlier requirement; they set up a test radically different from that of mere size and weight. To save the new paragraph from cancellation it must be construed to require that the stones should have the mean dimensions named and the weight named per cubic foot as calculated from those dimensions.

It is inconceivable that the engineer officer in charge in May, 1904, would have yielded to claimant's contention if that had not been clearly correct, no matter what views the engineer and the other representative of the Government having to do with the construction may have held before that time. Captain Jadwin had now heard claimant's side of the case and doubtless had made some investigation of his own, and he unquestionably was led to the conclusion that the purpose of Captain Riche, who had let the contract, and of claimant, was what claimant stated it to be.

The argument of counsel at pages 24-26 of their brief to the contrary notwithstanding, the Court of Claims has in effect found that none of the crest blocks were rejected for any other reason than that by extreme measurements they were not of the dimensions named. The court finds that "claimant contended that said specifications provided for mean measurement of the blocks, while the inspector adopted extreme measurements and a large number of blocks were rejected by said inspector as not conforming to the specifications." By no rule of construction can this statement be made to include rejections with respect to anything else but the dimensions.

If, as counsel argue, the inspector was acting in good faith when he tested these stones by extreme measurements, that is nothing to the point. The question here is one of interpretation of the contract, purely and simply. However honest the inspector may have been in construing the contract wrongly and thereby injuring claimant, the Government is answerable for those injuries. The cases cited for the Government, where officers were upheld in the exercise of discretion in matters committed to their discretion, are not in point. It was for the inspector to determine the dimensions of the stones by correct measurements, and then to determine their weight per cubic foot. It was not for him to say whether he should take extreme or mean measurements. That question (the interpretation of the contract) is for the court's determination.

It is apparent, of course, that the Court of Claims rendered judgment with respect only to the stones improperly rejected.

Defendant's Second Specification of Error.

Here the exception is to the rendition of any judgment whatsoever in claimant's favor on Finding VII (Claimant has excepted to the judgment with respect to this finding as insufficient in amount). It is contended on behalf of the Government that the finding of the court that "it was manifest" that the core had fully settled or consolidated so as to permit the laying of the crest blocks at the times when the inspector was refusing the permission on the ground that the core had *not* sufficiently consolidated is not a finding of bad faith or such gross error as to necessarily imply bad faith; also that the finding does not show that claimant complained of the refusal of the permission at the time by appealing to the district engineer.

If it was "manifest" that the core had sufficiently consolidated the fact must have been clear to the inspector, who nevertheless denied it. Also, if it was manifest that the core had sufficiently consolidated when the inspector was saying it had not, it must be "manifest" to the court that the inspector's contrary allegations was false. How then can anything but bad faith be made out of this finding? If offensive terms must be avoided, claimant could not have chosen more fortunate language than the court has chosen for him.

The curious argument is made by counsel on page 32 of their brief that the finding of the court that "it was manifest that large parts of the work done by him had sufficiently [the *court* said *fully*] settled and consolidated" is in effect merely an expression of opinion of the court that because of the lapse of time the core "must have" sufficiently consolidated. The conclusion to which this would lead is that there was no evidence from which the court could make a finding. In fact the "opinion" or "judgment" is not that of the five judges of the Court of Claims but of witnesses amply qualified to speak. While we are not at liberty to discuss or even to cite the evidence, it seems proper that we say to this court that experts who have been at one time or another employed on this identical improvement testified that, for full consolidation of a substructure entirely new, as short a time as one-fifth of the wait required by the inspector on the core completed by claimant, on a foundation previously laid, was all that could be needed.

The Court of Claims, of course, may well have been impressed by the fact that claimant, before being allowed to lay the crest blocks, was required to build 1,400 feet of core on a perfect foundation, when prior contractors were required to keep the raw foundation only 300 feet in advance of the end of the completed work and to place the crest blocks whenever and wherever the core had been completed and the slope stones laid. (Aransas Pass Company's Specifications, Transcript, p. 2.)

As to the second objection, viz., that claimant did not appeal to the district engineer, it might as well be argued that he did not appeal to the Chief of Engineers, or, indeed, to the President of the United States. Paragraph 61 of the specifications set out in the petition, which the Court of Claims makes a part of Finding IV (Transcript, p. 23), contained this provision:

> "Between Stations 20 and 27 and from the vicinity of Station 55 seawards the method of construction shall be as follows: A mound of small riprap shall first be built up over and around the existing structure to about one foot elevation. When in the judgment of the United States agent in charge this mound has become sufficiently consolidated, its gaps and interstices shall be filled and its crest levelled with small riprap, generally one man stone. Large blocks shall then be bedded in crest of mound, etc."

Other provisions in this same paragraph make it clear that the "U. S. agent in charge" referred to was the identical person who in fact refused the permission, viz., the inspector, and that the decision of these questions was committed to him alone. It must have been so. To require or to permit appeal from the daily and hourly decisions of the inspector on the details would have been to postpone intolerably the completion of the work.

If claimant did not protest to the engineer against the decisions of the inspector (something that the findings do not show and that we do not admit to be true) this might be regarded as evidence that the inspector was not refusing him a right to which he was entitled. But we are not concerned here with evidence. We are dealing with the fact itself, as found by the court, and the fact is that the inspector did forbid the imposition of the crest blocks during a period when the structure was ready to receive them and when they were of the greatest importance to the speedy and economical prosecution of the work.

Neither of the cases cited by counsel (Lewman *v.* The United States, 41 Ct. Cls., 470, and Madison J. Bray *v.* The United States (No. 22954, Court of Claims, decided February 13, 1911) is in point. In the Lewman case the engineer officer and not the inspector was made the arbiter of such questions as might arise between the claimant and the inspector. The provisions of the specifications in this respect was set out on page 476 in the opinion of the court. In the Bray case the very matter quoted from the opinion of the court by defendant's counsel shows the inapplicability of that case as an authority, because the claimant did not protest to the officer whom the specifications made the final arbiter. In this case at bar, as we have already shown, no appeal was provided from the agent in charge and his word was law. The appellate jurisdiction of the engineer in charge related solely to the quantity and quality (Contract, par. 2, Transcript, p. 10) and that jurisdiction *was* invoked in the matter of the rejection of the crest blocks. The mere silence of the Court of Claims on a purely immaterial proposition is no basis for defendant's argument.

In their discussion of the extent of the delay also defendant's counsel, we submit, are in error. It is finally argued that if the Government is chargeable with any delay whatever "it can only be for the number of days which the court finds the particular acts complained of delayed the work." Thus far we agree with counsel. But they go on to say "the finding is for seventy days all told." If this statement were correct, and if that were the ultimate fact, we would not be appealing to this court. There is not the slightest element of speculation in our calculation of the time when claimant would have finished the work, set out on page 14 of our original brief, unless as to the two days April 26 and 27, 1904; for Finding VII, taken in connection with Finding XVII, makes it absolutely certain that the work would have been completed by April 28 but for the refusal of the permission to lay crest blocks. However, claimant's progress before he began the laying of the crest blocks was much slower than it was afterwards, and if the Court of Claims had made its findings in greater detail, we might justly contend that he would have completed the work at an even earlier date than we have calculated. In making this calculation we took no account of the delay by reason of the rejection of the crest blocks as counsel for the United States have it on page 35 of their brief, because we took no exception to the judgment of the Court of Claims on Finding VI. That delay is worked into the first, fourth and fifth items in our recapitulation on page 19 of our original brief just as allowed by the Court of Claims.

That this court may surely see the facts as we do, we coördinate below the findings of the court directly in point:

> "Between Stations 20 and 27 and from the vicinity of Station 55 seawards the method of construction shall be as follows: A mound of small riprap shall first be built up over and around the existing structure to about one foot elevation. *When in the judgment of the U. S. agent in charge this mound has become sufficiently consolidated*, its gaps and interstices shall be filled and its crest levelled with small riprap, generally one man stone. Large blocks shall then be bedded in crest of mound in two rows breaking joints with their longest dimensions parallel to the axis of jetty in such manner that voids under the placed blocks will be at a minimum, and side slopes and remainder of crest shall then be covered with large riprap. When completed, the jetty shall present at least as smooth and even a surface to the waves and as finished appearance as the

portion between Stations 27 and 40, which was constructed under a prior contract. *Where the uncompleted structure is liable to serious damages from waves, as small a length of the jetty as practicable shall be under construction at any one time."* (Petition, Transcript, p. 6, Finding IV, p. 23).

"Claimant entered upon the performance of said contract on the 18th day of August, 1903, and completed 2,100 feet of the jetty from the outer end thereof shoreward, when operations under the contract ceased, about September 17, 1904, owing to the exhaustion of the appropriation therefor." (Finding VI, p. 23.)

"When claimant had completed from 100 to 200 feet of the core he requested from the inspector in charge permission to begin to lay crest blocks, which was refused on the ground that the core had not consolidated. By the end of December, 1903, claimant had completed 400 to 500 feet of the core and again he requested permission to impose the crest blocks. Said inspector *refused and continued to refuse permission* to lay crest blocks *until May, 1904, at which time between 1,400 and 1,500 feet of the core had been repaired and completed. Commencing in October, 1903, when about 300 feet of the core had been built up to the required elevation, slope stones were laid on the jetty* which afforded some protection from the action of the waves to the riprap already constructed, but not as much protection as the crest blocks would have afforded. *When claimant was thus laying the slope stones, and throughout December, 1903, and January, February, March and April, 1904, it was manifest that large parts of the work done by him had fully settled and consolidated. If claimant had been permitted to lay the crest blocks, from that time on as the work progressed there would have resulted an additional protection which would have enabled him to work 60 days more than he did between that time and May 7, 1904, date the first crest blocks were laid.* When claimant was seeking permission to lay the crest blocks as aforesaid the inspector, in refusing same,

> alleged as a reason that the jetty had not had sufficient time to consolidate, and it does not appear that any other reason was at any time given by said inspector for so refusing." (Finding VII, p. 25.)
>
> "The total cost to claimant of performing the contract exclusive of the cost of the granite and the cost of transport, and fitting up and repairs to barges, was $63,780. The total number of days from the beginning to the completion of said work was 392, making an average daily cost to the contractor of $162.70.
>
> "The work was completed on September 17, 1904. The number of days actual work performed was 131, of which 58 were subsequent to the 30th day of April, 1904." (Finding XVII, p. 28.) (Italics ours.)

How can it possibly be said in view of all these findings that claimant was delayed for only 60 days? We do not see how the demonstration can be made clearer than it is on page 14 of our original brief. It is respectfully submitted that our calculation is correct and should be followed by this court.

The damages we have computed which were inflicted on claimant by this unlawful denial of permission to lay the crest blocks *alone*, amount to $28,779.80, as follows:

145 days delay at $162.70..........	$23,591.50
Loss of claimant's own time for four months and twenty-five days at $750 per month	3,625.00
Inspection charges for four and five-sixths months at the average per month of $323.45 as shown by Finding XVI, Transcript, p. 28...	1,563.30

Claimant could not object to the restriction of his reimbursement to the mere days (70) of the delayed work if the court had applied to those the multiplier proper to them.

The court took the cost of the work, exclusive of materials, and divided that by the entire number of the days elapsed from the commencement to the end of the work. This calculation, of course, yielded the per diem of cost of labor, etc., for the elapsed days. If the per diem for the days of work is to be ascertained, the cost obviously must be divided by the total of the days of work, 131. The per diem thus computed is $408.99. By this multiplier the reimbursement due claimant for the 70 days of work is $28,679.75 instead of $25,218.50, the total of items 1 and 3 in our recapitulation. (Original brief, p. 19.)

Defendant's Third Specification of Error.

On defendant's part there is assigned as error the reimbursing claimant a part of the inspection charges. The court allowed $320 because of the delay in the grounding of claimant's tug and $125, the balance of the February charges for the delay resulting from the quarantine. It also relieved against the inspection charges for 10 days and 60 days in the matter of the rejection of the crest blocks and the denial of the permission to lay those respectively, at the average rate of $323.45 per month. The judgment in this latter respect is also the subject of our third specification of error. (Brief, pp. 10, 15 and 16.) If defendant's contention is correct with respect to all the inspection charges except those reimbursable by reason of the denial of the permission to lay the crest blocks it would mean a reduction of $552.80 from the amount stated in our recapitulation on page 19 of our original brief—that is $125, plus $320, plus one-third of $323.45, or $107.80.

As we read the provisions of the contract it required that for all delays not the fault of the claimant, the engineer officer should grant him an equivalent extension of time. Of course, if there had been any question, or doubt, that the epidemic or the grounding of the tug were causes of delay, then the function of the engineer officer was to decide that question in good faith. It is conceivable that, though these circumstances might apparently have caused some delay, they really had no such effect because for other reasons claimant might not have been ready to proceed. In other words, it was obviously in contemplation of the parties that, if the performance of the contract was delayed by circumstances beyond the control of the claimant, he should be relieved of the expenses of superintendence for an equivalent period; otherwise that provision in the contract would have been mere surplusage. Now, as to the delay caused by the epidemic, the engineer officer took no notice of any delay beyond the more duration of the quarantine. That is, instead of determining what the delay arising out of this cause was, he arbitrarily allowed a remission of the charges merely for the period of the proclaimed quarantine. The other delay due to the grounding of the tug he ignored altogether. In short, he did not exercise the functions of his office and discharge the duties imposed upon him by the contract. The judgment of the Court of Claims on Findings XIII and XIV should therefore be affirmed.

Objection is also made on the Government's part to the remission of any inspection charges for the ten days' delay caused by the rejection of the crest blocks and for the delay caused by the refusal of permission to lay the crest blocks. In our discussion of the defendant's first and second assignments of error, we have given our reason why the first of these items should be affirmed and the second should be increased.

Defendant's Fourth Specification of Error.

Defendant objects to the allowance of any judgment to claimant for the value of his personal services in superintending the work during any portion of the delay resulting from causes not the fault of the claimant. On our part we have requested this court to allow to claimant the value of his personal services during the time alone when he was delayed by the Government's unlawful interference with the contract. (Claimant's original brief, p. 15.) It is submitted that this is a proper item for judgment. The law is clear that where one party to a contract unlawfully interferes with the other's performance, the latter may recover the value of his lost time, especially where there is no allowance for the loss of prospective profits.

Kelly v. The United States, 31 Ct. Cls., 369, 375.
United States v. Behan, 110 U. S., 338, 345.

No allowance has been made to claimant for the loss of prospective profits. The court has simply allowed the actual damages arising out of some of the delays according to the nature of those delays, including an entirely insufficient award for claimant's own time. Finding XVIII (Transcript, p. 28) is as follows:

> "Claimant, under the requirements of paragraph 35 of the specifications, personally superintended said work the whole time. The value of his personal services in so doing was $750 per month, but it does not appear that at this particular time he had any other enterprise under way or any other employment."

Obviously the clause: "but it does not appear that at this particular time he had any other enterprise under way or any other employment," is pure surplusage. If his time was *worth* $750 per month he should be *allowed* $750 per month during that portion of the delay caused by the unlawful interference by the Government's agents—and what this should be we have shown on page 15 of our original brief.

Board and Cost of Labor.

The amounts claimed of this court on these two items are respectively $560 and $87.16. The allowances are objected to by defendant and are the subject of our fourth and fifth assignments of error discussed on pages 17 and 18 of our original brief. We have said there all that seems to be necessary to cover our contentions on these items. It only remains to be said that if the engineer officer had performed the duties laid upon him by the contract he could not have allowed claimant only $2.00 per day for labor costing him $6.00, or $15.00 per month for board at this remote point on the Texas coast, when it was costing him $20.00 per month to board his own employees. The officer did not even profess to allow the claimant the cost of either the board or labor.

CONCLUSION.

It is respectfully submitted that these findings clearly indicate the judgment which should be awarded to claimant. A series of errors are shown to have been made against a man whose patience may be likened unto that of Job. One of these errors was such a gross misuse of authority that the contractor would have been justified, on account of the expense, in abandoning the contract; but instead of doing this, he went ahead and completed his work. Throughout the whole of a long brief in defense of the Government not one word is said in explanation of the assessment of the inspection charges during the delay resulting from the alleged refusal of that core to consolidate—which obviously could not have been claimant's fault. Perhaps the reason is that it is not susceptible of explanation.

It is clear indeed that all of the delays with which these appeals deal were caused by the agents of the Government and demand reimbursement of claimant's losses.

WM. H. ROBESON,
Attorney for Claimant.

BENJ. CARTER,
F. CARTER POPE,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 887.

HENRY C. RIPLEY, APPELLANT,

v.

THE UNITED STATES, APPELLEE.

No. 888.

THE UNITED STATES, APPELLANT,

v.

HENRY C. RIPLEY, APPELLEE.

Brief for Henry C. Ripley on Additional Findings of Fact by Court of Claims.

Under this court's mandate of April 24, 1911, the Court of Claims has made supplemental findings of fact as below:

> The court finds, supplemental to said Finding VII, as follows:
>
> (1) When denying permission to the claimant to lay crest blocks, as stated in Finding VII, the inspector in charge knew from the time which had elapsed that large parts of the core theretofore completed by the claimant had fully settled and

consolidated and were ready for the crest blocks to be laid thereon.

(2) The refusal of said inspector to allow crest blocks to be laid at the time requested in said Finding VII, thereby unreasonably delayed the work and was, on his part, a gross mistake. There is no other evidence of bad faith on the part of the assistant engineer in immediate charge.

(3) There is no evidence to show that any protest or notice was ever made to the engineer in charge (whose office was in Galveston) or to the Chief of Engineers (whose office was in Washington) or to any officer other than the Assistant Engineer in immediate charge of the work of inspection."

It is to be noted at the outset that, while the Court of Claims, at two places in the supplemental findings, has followed the terminology of the mandate and of the original findings in saying "inspector in charge," it has at two other places employed the actual title of this officer, namely, "Assistant Engineer."

Animus of the Assistant Engineer.

The opinion of this court, under which the Court of Claims was directed to make these supplemental findings, is in a tone of surprise that the record lacked distinctness on the point of the knowledge of the Assistant Engineer, during some six months, that the core of the jetty was in that condition which entitled the contractor to lay the crest blocks and so bring the structure above the water level. The supplemental findings cure this defect. They, however, go something beyond that purpose. Having convicted the Government's agent of a conscious invasion of the contractor's rights in this matter of the capping of the structure, they say "there is no other evidence of bad faith on the part of the Assistant Engineer in immediate charge."

While the Court of Claims was not commissioned by the mandate of this court to inquire of manifestations by the Assistant Engineer of bad faith elsewhere than on the point of the laying of the crest blocks, there is no serious reason to complain on Mr. Ripley's behalf of what the court has gratuitously said.

The relevancy of that added sentence is to original Findings VIII and X, on the subject of the *building up* and *leveling* of the core. These details of the construction, together with the authorizing of the capping, were the only matters of which the Assistant Engineer had discretion. As to the matters narrated in those two findings the court acquitted this officer of wrongdoing; and it now does the same thing in different language. This, however, has not the slightest pertinency to the fact that when the parties came to the question of laying the crest blocks the Assistant Engineer betrayed a purpose to deny to Ripley his contract rights.

We take it a conviction of one offense against the penal laws was never set aside in any court on proof that the defendant had never committed any other crime.

In the judgment of the Court of Claims, of course, nothing was allowed on the items of the complaint to which Findings VIII and X relate.

There is no coherence in the supplemental findings of the Court of Claims except on the reading we are here giving them. It only remains then to say in this connection that the Court of Claims, having convicted the Assistant Engineer of consciously invading claimant's rights in the matter of the laying of the crest blocks, has subtracted nothing from the contractor's right of action when it refrained from employing words implying utter depravity of purpose. The case would not have been affected, indeed, if the court had positively found that in this matter the Assistant Engineer, with no ill feeling of his own to gratify, merely subscribed to unfriendly purposes of his superiors toward the contractor, or that, with no thought whatever of his superiors, he felt it a high duty to ruin this contractor and thus exemplify the fate of those who would lead the Government, in these great improvements, into the adoption of a particular design which he deemed injurious or ineffective. It is sufficient that (from whatever motive) he asserted what he knew was not true; that he consciously denied claimant a right which the contract gave him. The United States Government can never go free of responsibility because its agent was fanatically sure of his duty to take away a lawful right from a contractor.

Notice to Superior Officers of Assistant Engineer's Action.

The Court of Claims had taken the view that the contract did not require, or authorize, any appeal, in the matter of laying of the crest blocks, from the Assistant Engineer to the superior officers; and therefore nothing was said in the findings on the fact of such appeal or on any fact related thereto. In the opinion of this court nothing whatever is said in this connection; but the mandate inquires "whether at any time the claimant notified the engineer officer in charge or the Chief of Engineers that the inspector in charge wrongfully refused to permit the laying of the crest blocks, and if such notice was given, whether it was oral or written, when the notice or notices were given, and what action, if any, was taken by such superior officer"—this and nothing more. Thus the Court of Claims was not commissioned to find anything but the fact of appeal or notice, *vel non*, from the Assistant Engineer to the Engineer or the Chief of Engineers, and the supplemental finding is confined rigidly within the terms of the commission. It will readily be seen that if no such appeal was ever intended by the parties or that, as it turned out, it was not possible to take such an appeal, the claimant, on the present record, may suffer injustice.

Those parts of the specifications which are before this court serve in some measure to distinguish the functions of the Assistant Engineer from those of the superior officer. In fortunate juxtaposition paragraph 41 names the "U. S. agent in charge" (this Assistant Engineer) as the judge of the placing of materials, and paragraph 42 makes the Engineer the judge of the necessity of the contractor's furnishing labor and appliances to the Government for its own use, or of his boarding the Government's employees (Rec., p. 5). Paragraph 61, relative to the laying of the crest blocks, again, names the "U. S. agent in charge" as the judge and does not mention the Engineer (Rec., p. 6). There is nothing in this record, however, to show whether Ripley, if he had desired, could have appealed to the Engineer in this matter of the capping of the structure. We must assume that if this court should take the view that the contractor should have appealed to the Assistant Engineer, it will wish to know how the case stands on the two other points. We can not believe this court would not, in the event we suggest, give weight to such conditions of fact as the following—which, of course, we submit purely as hypotheses.

> That the specifications and contract nowhere provided for any appeal from the decisions of the Assistant Engineer in charge at the jetty regarding the readiness of the structure to receive the crest blocks;
>
> That the specifications as a whole differentiated clearly between (1) the Engineer at Galveston and (2) "the Assistant Engineer in charge" or "U. S. agent in charge" in all matters which were to be determined by the judgment of the one or the other;
>
> That in the plan of the work, laid out after the contract was signed and approved, there was no provision for any review of such decisions of the Assistant Engineer;

That there was not in fact present at the District Engineer's office in Galveston or at the site of the work, in the months of October, November, and December, 1903, and January, 1904, when this dispute regarding the laying of the crest blocks was acute, any officer of the United States to whom appeal could be made from such decisions of the Assistant Engineer;

That in the course of this dispute the Assistant Engineer always averred that the matter was absolutely to be controlled by his decisions;

That the Assistant Engineer himself constantly communicated to the Galveston office the contractor's objections to said delay.

Since this court, without setting aside the submission of the case, has of its own motion called on the Court of Claims for some amplification of the record, it does not seem proper that we make any formal motion in this connection; but we respectfully submit that if the court should take the view that there was a *prima facie* necessity for the contractor to give the indicated "notice" to the Engineer at Galveston, the case should again be sent back to the Court of Claims with directions to make findings on the above points of fact and on any others touching the relative functions of the Engineer and the Assistant Engineer in charge at the site of the work.

Though the contractor was not obliged to appeal from the decisions of the Assistant Engineer in charge, it is conceivable that, not having made such appeal or given any notice to the Galveston office, he could be held, in a proper state of facts, to have acquiesced in the rulings of the Assistant Engineer; but the original findings distinctly rebut all presumption of such acquiescence. It is recited that the contractor's application for leave to begin laying the crest blocks was first made when he "had completed from one hundred to two hundred feet of the core';' that he, when he had "completed four hundred to five hundred feet of the core . . . again requested permission to impose the crest blocks" and the Assistant Engineer "continued to refuse permission to lay these blocks until May, 1904" (Finding VII).

It is clear that, so far from acquiescing in the decisions of the Assistant Engineer, Ripley was constantly protesting to him and renewing his request for leave to do what he was entitled to do under the contract.

To say nothing more of the findings and their omissions, the very nature of the case forbids that the contractor was obliged to appeal from the decisions of the Assistant Engineer. The matters which were subject to that officer's discretion all concerned the daily progress of the work, and a decision on any of them involved visual examination of the structure. If the contractor for protection of his rights was required to invoke a review of the action of the Assistant Engineer, this would mean the stoppage of the work while the Engineer (if he happened to be present) could come at his convenience from Galveston, 300 miles away. The execution of such a project, in that way, we submit, is unthinkable.

If, however, the contractor was by implication obliged to appeal from the Assistant Engineer to the Engineer, he was equally bound by implication to appeal, when necessary, beyond the ~~Assistant~~ Engineer, to the Chief of Engineers, the Secretary of War and possibly to the President. But what would become of the work in the weeks or months consumed in such appeals; and for what sums would not the Government be answerable in damages when it was finally determined that the Assistant Engineer had acted wrongfully.

We do not find in any of the adjudicated cases the doctrine that appeals lie, in these matters of discretion, from the subordinate officer trusted with the discretion to his superiors, rank by rank. On the contrary the courts have declined to question the decisions of officers having this discretion, in however low rank, whenever they have honestly exercised that discretion; this on the ground that the parties have made that indentical officer, on the one condition of entirely good faith, the arbiter.

In the present case the parties had made the Assistant Engineer the arbiter of the readiness of the core of the jetty to receive the crest blocks; and against his decisions in that matter, if made in perfectly good faith, neither party could have redress. For reasons satisfactory to the parties, that is to say, there was to be in this particular matter this one arbiter and none others; and this for the evident reason that there could be no other without serious detriment to the work. It is inconceivable, we submit, that this contractor (who, as the court has found, had a hand in the drawing of the specifications) would have agreed to the designation of any other arbiter or would have bid on the work, and signed a contract, if any other had been designated.

Time for Which Reimbursement is Due.

Having had no opportunity to file a second brief before the submission of the case in this court, we avail ourselves of the present opportunity to point out some errors in the reply brief filed for the Government, having the most important bearing on the quantum of claimant's compensation.

At pages 9 and 10 of the brief the proposition is laid down that the finding of the court that "if claimant had been permitted to lay the crest blocks from that time on as the work progressed there would have resulted an additional protection which would have enabled him to work sixty days more than he did between that time and May 7, 1904, the date the first crest blocks were laid," is in effect a finding that claimant was delayed only sixty days; and reference is made to the facts that between August 18, 1903, and May 1, 1904, claimant worked seventy-three days, and that from May 1st he worked fifty-eight days. The argument is that it was impossible that the delay referred to caused the further delay of one hundred and forty-five days after that time. All these contentions are so beside the fact that but little explanation is needed.

From August 18th to May 6th is two hundred and sixty-two days, in which there were thirty-seven Sundays. This leaves two hundred and twenty-five possible working days; and the progress that was made by claimant in that time was one day in a trifle over every three days. From May 7 to September 17, 1904, is one hundred and thirty-three days, of which nineteen were Sundays, leaving one hundred and fourteen possible working days. It will not be denied that the last ten days of the time were spent in inspection and the details of closing the business. If these ten days and the ten days loss of time caused by the rejection of the crest blocks be deducted, we have ninety-four possible working days, of which claimant worked 58, or 1 in every 1.62 days; the percentage of time worked after the laying of the crest blocks was begun being 61.7. If this same rate of progress had been maintained from the beginning of the work claimant could have done 139 days' work before May 7th, a margin of 8 days over the 131 days actually required for the completion of the work.

A peculiar hardship to the contractor was that, through the slow progress he could make in the comparatively good weather of November to February, he was thrown over into the much rougher weather which, as the court knows judicially, occurs in that region between the vernal equinox, in March, and the summer solstice, in June. If the Assistant Engineer had given him his rights, to the end that he might work to good advantage before the period of storms, the work undoubtedly would have been completed before the time indicated in the findings.

We must confess that what we are here saying, like the argument to which we are replying, is, in the present state of the case, mere speculation. The inquiry as to the time when the project would have been completed is closed by the findings. The meaning of the findings is that, if Ripley had been permitted to do his work in the order to which he was entitled, the last stroke of work would have been done and Ripley would have been making a welcome journey away from that field of controversy and oppression by the 26th day of April, 1904. He was detained on the work then, by acts for which the Government was responsible, for 145 days subsequent to April 26, and for every one of those days the Government must reimburse him. The computation of time made by the Court of Claims which yields this result (while not giving to claimant all that we had sought in our argument) is for the purpose of the present hearing the correct computation.

The question before this court is the amount of compensation which claimant shall recover for these 145 days. The Court of Claims has awarded compensation for the days of actual work alone included in this period of delay, *and* applied to them a per diem proper to the full number of days, including Sundays and secular days lost through bad weather. To make the matter perfectly clear, it should have been said in the second paragraph of Finding XVII that the number of days which elapsed after the time when claimant, if allowed his rights, would have completed the work, was 145; for it is to that number of days the per diem of $162.70, stated in the same finding, is to be applied.

Respectfully submitted.

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Attorney for Henry C. Ripley.

BENJ. CARTER,
F. CARTER POPE,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

HENRY C. RIPLEY, APPELLANT, *v.* THE UNITED STATES, APPELLEE.	No. 887.
THE UNITED STATES, APPELLANT, *v.* HENRY C. RIPLEY, APPELLEE.	No. 888.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

The response of the Court of Claims to the mandate of this court, directing that additional findings be made, in no way affects the vitality of the argument heretofore presented in the briefs for the United States. It serves rather to strengthen the contention made in behalf of the Government, especially as to the proposition made on pages 33 and 34 of the original brief.

The finding of the court, to the effect that the inspector in charge *knew* "from the lapse of time" that large parts of the core had sufficiently settled and consolidated, adds nothing to the force of claimant's contention. There is nothing in this finding to justify the inference that he had any conscious knowledge that the core had settled sufficiently. It makes clear, definite, and certain the truth of the suggestion we have already made (p. 32, original brief), that the court's finding the core had "manifestly" fully settled and consolidated, etc., is an inference drawn from the fact that in its judgment sufficient time had elapsed to bring about that condition. The supplemental finding of the court now made simply goes to the extent of expressing the further opinion that the inspector ought to have known this. It is submitted that whether the months of December, January, February, March, and April were sufficient time to permit the core to consolidate so as to justify the laying of crest blocks, is not a matter of such certainty as to enable the court to say that it must be patent to everyone. There is still nothing in the findings, taking into consideration the first and second paragraphs of the supplemental findings, to charge the inspector with having *known*, when he refused permission, that he was wrong. The finding that this refusal was "a gross mistake" might constitute constructive bad faith, if it were not for the nature of the "mistake" pointed out in the findings of the court. That "mistake" evidently consisted of his being unable to perceive that which appears patent to the court, to wit, that four or five months was sufficient time for the core to consolidate. Under some circumstances and conditions this might be true, but the ultimate fact to be determined is whether or not the core had "in the judgment of the U. S. agent in charge" sufficiently settled and consolidated. The Court of Claims has not yet said positively and unequivocally that this core had as a matter of fact sufficiently consolidated to permit the laying of crest blocks at the time the inspector is said to have refused such permission. It has expressed its opinion that the lapse of time had been great enough or long enough to effect that result. That is a matter of opinion. It is the very question about which the contractor and inspector disagreed, the former insisting that enough time had elapsed to make certain the consolidation of the core, and the latter, the inspector, asserting that sufficient time had *not* elapsed. Now comes the Court of Claims and says in effect that in its opinion the contractor was right in the matter.

But if the refusal of the inspector to allow the crest blocks to be laid was such a gross mistake as necessarily to imply bad faith, why did not the contractor complain of it to the engineer in charge? The court finds in effect that there is no evidence to show that any protest or notice was ever made to anyone except the person in charge of the work of inspection, that is to say, *the inspector*.

The language of the court's first amendment to Finding VII was not responsive to the mandate of this court, but a later finding, made and certified since leave was granted to file this brief, corrects this defect. It is now answered that no protest or notice was ever made to the engineer in charge, or to the Chief of Engineers. The court, however, inserts, parenthetically, a statement of fact of which this court would take judicial notice in any event, as to the location of the offices of said respective engineers. It is assumed that upon this statement the argument will be predicated by counsel for claimant that it was difficult, or inconvenient at least, for the contractor to protest to either of said officers. This argument is so fragile that it will break with handling. Furthermore, the court in its amended finding has given to the inspector who made the refusal involved a title which does not belong to him. The court says:

> The assistant engineer in immediate charge of the work of inspection.

This does not comport with the original seventh finding (Transcript, p. 24), wherein the officer or person who refused permission to begin the laying of crest blocks is denominated the "*inspector* in charge." Why this change in title is made is inexplicable to us. It will no doubt be used by counsel for claimant in their contention that the person who refused such permission was the "U. S. agent in charge;" that he was an assistant engineer; that he had "immediate" charge of the inspection. There is not one word in any other part of the record before this court to justify the statement that the inspector whose refusal is said to have unreasonably delayed the work was anything more than an inspector. The facts before the court, as found in the seventh finding of fact, and in the amendments thereto, make it clear that the contractor made no protest or objection to any other person or official connected with the United States Government, in so far as relates to the performance of this contract, except the "*inspector*" to whom he applied for permission to begin laying crest blocks.

The contract provided that one or more inspectors should be employed by the United States, who were to be furnished with facilities, etc., by the contractor. The fixing of the time when the core had sufficiently consolidated to permit the laying of crest blocks was in reality no part of the duty of one of these inspectors. That matter was to be determined by the "U. S. agent in charge." It was never submitted to him for decision. The claimant argued that matter with the inspector. He did not go to the United States agent in charge and ask permission to lay the crest blocks, nor did he go to said agent in charge and complain because of the action of the inspector in the premises. Whatever objecting or protesting he did was orally done and to the inspector alone. (Original Finding VII, p. 25; Supplemental Finding VII.)

The argument that the "U. S. agent in charge" was the employee who happened to be at the site of the work engaged in passing upon the condition of the work with respect to laying crest blocks and that there was no appeal from his decision is met by the contract itself.

> The work shall be executed under the supervision of the *engineer officer in charge* and his duly authorized agents. The order of the work shall be subject to the approval of the

engineer officer in charge. The alignment of the work shall be prescribed by him and without his permission no work shall be conducted on Sundays and legal holidays. (Paragraph 35, Transcript, p. 4.)

The United States will employ one or more inspectors on each work. The contractor without additional compensation shall, when required, furnish every facility to such inspector and for the engineer officer in charge and his agents to supervise and inspect all work and materials and to send and receive official mail. * * * (Paragraph 38, Specifications, p. 4.)

The weighing will be done by an agent of the United States by the track scale, and all facilities for adjusting and testing it must be furnished by the contractor. It shall be located as close as practicable to the work or the point where the rock is transferred from railroad cars to barges, and all cost of weighing other than the services of the agent of the United States shall be borne by the contractor. Empty cars returned from the work shall be weighed whenever directed by the United States agent in charge. Any disagreement as to weights that may arise between the above-mentioned agent and the contractor shall be communicated in writing by the contractor to the *United States agent in charge* within 48 hours of the time at which the disputed weighing was done; otherwise the contractor's contention may be disregarded in preparing estimates. * * * Inspecting, measuring, and weighing of materials will be

> done only between the hours of 7 a. m. and 4 p. m., unless other hours should be specifically authorized by the engineer officer in charge. (Paragraph 40, Transcript, p. 4.)

The language of the above-quoted provisions clearly shows that "engineer officer in charge" and "U. S. agent in charge" are used synonymously. Where there was dispute between the contractor and the inspector, the action of the latter was to be considered as final, unless protest was communicated in writing by the contractor to the "U. S. agent (U. S. engineer) in charge." Here we have a direct and unequivocal provision for appeal on disputed matters with relation to "weighing." It may be argued that this does not apply to the determination of the time when crest blocks might be laid, that being left to the judgment of the "U. S. agent in charge." But it does assist very much in finding out who is meant in this contract by the term or title "U. S. agent in charge." The inspector who refused to allow the contractor to begin laying crest blocks at the time requested was on a par with the inspector who was to weigh the stone. He was no more the "U. S. agent *in charge*" than was the weighing inspector or "agent."

Looking to the whole contract and giving it a reasonable interpretation, it seems to us there is only one person who can be the "U. S. agent in charge" and that person must be the engineer officer under whose supervision the work is to be done and under whose direction the inspectors appointed by the Government are to work; whose decision "as to quality and quantity shall be final"; the man who was authorized to annul the contract under certain conditions; the man who was to determine the cost of board and lodging when furnished by the contractor, also the price of such boats, labor, and materials as might be required of the contractor to assist the United States in surveying, inspecting, etc.; the man to whom the contractor was obliged to furnish facilities for inspectors and "for the engineer officer in charge and his agents." That person was in the first instance Capt. Riche, between whom and the claimant the contract was made and who remained in charge for a time, and Capt. Jadwin, who at the time of the controversy involved in this lawsuit occupied that position or station. His office was in Galveston, the headquarters of the district. He was the "forum," where the contractor could have gone and presented his grievances. Having failed to do so, we submit that the principle stated by the Court of Claims in the case of Bray, trustee, etc., cited on page 34 of the original brief for the United States, is applicable here, and as a consequence, the judgment of the Court of Claims should be reversed.

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PHILIP M. ASHFORD,
Attorney.

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Supreme Court of the United States.

HENRY C. RIPLEY, APPELLANT, *vs.* THE UNITED STATES.	No. 498.
THE UNITED STATES, APPELLANT, *vs.* HENRY C. RIPLEY.	No. 499.

In response to the order of the Supreme Court of December 4, 1911, remanding the above-entitled cause for additional findings on the questions—

"First. Whether, when the claimant was laying the slope stones and during the months of December, 1903, and January, February, March, and April, 1904, as recited in Finding VII, the inspector in charge knew 'that large parts of the work done by the claimant had fully settled and consolidated.'

"Second. Whether in the various refusals to permit the laying of crest blocks stated in Finding VII the inspector in charge acted in good faith.

"Third. Whether at any time the claimant notified the Engineer officer in charge or the Chief of Engineers that the inspector in charge wrongfully refused to permit the laying of the crest blocks, and if such notice was given whether it was oral or written, when the notice or notices were given, and what action, if any, was taken by such superior officer"—

The court makes additional findings as follows:

(1) When denying permission to the claimant to lay the crest blocks, as stated in Finding VII, the assistant engineer, who was an experienced officer of the Government in such work and who was acting as inspector in immediate charge of the work, knew that large parts of the core theretofore completed by the claimant had fully settled and consolidated and were ready for the crest blocks to be laid thereon.

(2) The refusal of said assistant engineer as inspector in immediate charge of the work to allow crest blocks to be laid when he knew that parts of the core had settled and consolidated, as aforesaid, was gross error and an act of bad faith on his part.

(3) There was no protest made to the engineer in charge, whose office was in Galveston, or to the Chief of Engineers, whose office was

in Washington, respecting the refusal of said assistant engineer to permit the laying of crest blocks as aforesaid. The claimant made frequent complaints to said assistant engineer about the delays so caused by his refusal to permit the laying of crest blocks.

The claimant visited the office of the engineer in charge at Galveston about once a month, and while there complained generally that said assistant engineer as inspector in immediate charge of the work was too strict with him in construing the specifications and contract. No appeal, either written or otherwise, was taken or asked by the claimant to either the engineer in charge or to the Chief of Engineers because of said refusal to permit the laying of crest blocks.

BY THE COURT.

A true copy:
Test this 22d day of December, 1911.
[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

Attest:
STANTON J. PEELLE,
Cf. Justice.

(Indorsement on cover:) File Nos. 22508 and 22509. Supreme Court U. S. October Term, 1911. Term Nos., 498 and 499. Henry C. Ripley, appellant, *vs.* The United States. The United States, appellant, *vs.* Henry C. Ripley. Response of Court of Claims to order of December 4th, 1911. Filed December 23, 1911.

O

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

Nos. 887 and 888.

HENRY C. RIPLEY, *Appellant,*
887 *vs.*
THE UNITED STATES.

THE UNITED STATES, *Appellant,*
888 *vs.*
HENRY C. RIPLEY.

APPEALS FROM THE COURT OF CLAIMS.

MOTION OF HENRY C. RIPLEY FOR SECOND REMAND TO THE COURT OF CLAIMS, WITH EVIDENCE AND BRIEF.

Comes Henry C. Ripley, appellant in appeal No. 887 and appellee in appeal No. 888, by his attorney and shows to the court that, by mandate of this court signed on the twenty-fourth day of April, 1911, directing that additional findings of fact be made, the Court of Claims, in the matter of permission sought for laying of crest blocks, forming the highest stratum of the jetty in question, was restricted to the fact of notice addressed by him (Henry C. Ripley) to the engineer officer in charge, or to the Chief of Engineers, of the inspector's denial of such permission, and, having no authority to find, said court has not found any facts from which this court can determine whether it was incumbent on the contractor to send such notice to the engineer officer in charge or to the Chief of Engineers or why the same was not sent; that in fact no such notice was made because the contract, and the plan pursued in the work did not require or provide for the same, and because the engineer officer or his assistants at Galveston, Texas, were repeatedly informed, by communications from the chief inspector and by conversations with said Henry C. Ripley himself, of said action of the chief inspector and invariably refused to correct or interfere with the same; and that in fact the decisions of said chief inspector in said matter could not have been subject to review and correction without delaying the work and subjecting the contractor and the structure itself to serious injury against which it was the purpose of the contract to guard. Wherefore said Henry C. Ripley moves that said submission of said appeals be set aside and that, if this court be of opinion, on the record now before it, that he was obliged to make such notice to said engineer officer in charge or the Chief of Engineers, the cause will be again remanded to the Court of Claims with directions to find and report to this court, from the evidence already on file and any additional evidence that may be submitted, the facts pertinent to the following questions:

Whether the contractor was obliged or was authorized to appeal from decisions of the Assistant Engineer in charge at the jetty regarding the readiness of the structure to receive the crest blocks.

Whether in the plan of the work, laid out after the contract was signed and approved, there was any provision for review of such decisions of the Assistant Engineer.

At what times, if any, there was present at the district engineer's office in Galveston, in the months of October, November and December, 1903, and January, March and April, 1904, any officer of the United States exercising the right, on notice, to review and overrule such decisions of the Assistant Engineer in charge at the jetty.

Whether the Assistant Engineer in charge at the jetty himself constantly communicated to said district office at Galveston the contractor's objections to the delay of the laying of the crest blocks.

Whether said Henry C. Ripley himself, in oral communication with said engineer officer or other person in charge at said office in Galveston, constantly and promptly spoke of said action of the Assistant Engineer at the jetty regarding the laying of the crest blocks and of his own objections thereto and whether, after said communications, said action was reviewed and corrected by said office or was allowed to stand uncorrected.

With and in support of this motion there is filed an affidavit of said Henry C. Ripley himself, one other affidavit and a certified copy of the printed evidence on which the cause was heard in the Court of Claims.

WM. H. ROBESON,
Attorney for Henry C. Ripley.

AFFIDAVIT OF HENRY C. RIPLEY.

Consulate General of the United States of America at Rio de Janeiro, Brazil, ss.

Henry C. Ripley, being first sworn according to law, doth depose and say:

I am at present residing in Rio de Janeiro, Brazil, but during the years 1903 and 1904 I was a contractor with the Government for the construction of the jetty at Aransas Pass, Texas, and am the claimant in the Court of Claims, Case No. 28555, Henry C. Ripley vs. the United States.

That the actual work on the jetty was commenced August 18th, 1903, and was finished September 17th, 1904, a total period of exactly thirteen months. That during this period Colonel Edgar Jadwin, the engineer officer in charge, was absent from his station at Galveston about seven months, approximately as follows: During a part of October, during November and December, 1903, January and part of February and during June, July and part of August, 1904. That during his absence from his station he was reputed to have been mostly in New York having his eyes treated. That to my recollection Colonel Jadwin only visited the work once after operations had commenced and then I did not go with him on the work because he came without notice to me and went upon the work without my knowledge of the fact until afterwards.

That the placing of the large riprap for the protection of the core of the work was commenced in the month of October, 1903, at which time the work had consolidated so as to permit the placing of the crest blocks, and I so expressed myself to the United States Assistant Engineer in charge and requested permission to order them from the quarry; but the Assistant Engineer refused, assigning as a reason for refusal, that the work was not sufficiently consolidated for the crest blocks and saying that he would give notice in ample time to have the crest blocks on the ground by the time the work was ready for them. This United States Assistant Engineer was the chief inspector on the work and his office was at the site of the work which was subject to his visual examination from day to day. He was bound to know that the core had sufficiently consolidated to permit the laying of the crest blocks, because it was impossible for him to know anything else.

The survey of the work made by the Engineering Department of the United States, and dated November 2d, 1903, shows that 550 feet of the core had been finished up to that time, that is to say that it had been built up to the height of mean low tide and was ready to be leveled off and bedded for the crest blocks, and it was about this time that the question as to the time for placing the crest blocks was brought by me to the attention of the Galveston office (during Colonel Jadwin's absence) which sustained the action of the assistant, or inspecting engineer, in denying me the permission to place them. Thereafter I made frequent requests of the Assistant Engineer for permission to lay these crest blocks, but his permission was always denied, the said assistant always saying either that the core had not sufficiently consolidated or that he would let me know when he was ready for them.

Again in February, 1904, when the use of granite riprap first commenced or early in March I brought this matter to the attention of Colonel Jadwin, who had just returned from an absence of about four months, and asked him personally for permission to commence the placing of the crest blocks, but he sustained the action of the inspecting engineer in refusing me this permission. I made these requests verbally, and while the exact dates cannot be recalled at this time, the circumstances are well remembered and the conditions of the work at these times make it possible to fix approximately the dates above given. Mr. Hartrick was never present at a conference which I had with Colonel Jadwin. Whenever he was called in by Colonel Jadwin it was for the purpose of answering some specific question, and as soon as this was answered he retired.

The Assistant Engineer made frequent reports to the Galveston office, and I always supposed, and do now believe, that he communicated my repeated requests, for permission to lay the crest blocks, to the Galveston office. I did not take any formal written appeal from the Assistant Engineer to the district engineer, but on my visits at Galveston I reported to Colonel Jadwin the rulings and actions of the Assistant Engineer regarding the laying of the crest blocks and made complaint against them and demonstrated to Colonel Jadwin that I was correct in my position; but Colonel Jadwin instantly sustained the action of the Assistant Engineer.

Witness my hand this 16th day of August, 1911.

(Signed) Henry C. Ripley.

Witness to signature of Henry C. Ripley:

Y. A. Cavallero.
C. V. Sontroy.

Certificate of Acknowledgment of Execution of Document.

Brazil, Rio de Janeiro, Consulate General of the United States, ss.

I, Julius G. Lay, Consul General of the United States of America at Rio de Janeiro, Brazil, duly commissioned and qualified, de hereby certify that on this 16th day of August, 1911, before me personally appeared Henry C. Ripley to me personally known, and known to me to be the individual described in, whose name is subscribed to, and who executed the foregoing instrument, and being informed by me of the contents of said instrument duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal the day and year last above written.

Julius G. Lay,
Consul General of the United States of America.

AFFIDAVIT OF LEWIS M. HAUPT.

State of Pennsylvania, County of Philadelphia, ss.

Before me, a Notary Public in and for said State and county, appeared this day Lewis M. Haupt, who, being by me sworn, made oath and said that he is the same person who, in the case of Henry C. Ripley vs. The United States, No. 28555, in the Court of Claims of the United States, is mentioned in the testimony and findings of fact as having aided in preparing the specifications under which the contract of said Henry C. Ripley for part construction of a jetty of the Harbor of Aransas Pass, Texas, was awarded; that affiant has continuously since 1903 had business relations with said Henry C. Ripley and has been in constant correspondence with him during said period; that for some five years past said Henry C. Ripley has, in the practice of his profession as a civil engineer, been employed on the construction of an extensive system of harbors in Brazil and has been at some times in the city of Rio de Janeiro, but at other times in various provincial parts of Brazil; that during said period an average of three months has been required for the transmission between affiant and said Henry C. Ripley in Brazil of a letter and reply; that Henry C. Ripley, during said period, has been in the United States but twice, the last of which visits was in the year 1910. Affiant further says that, when he was assisting in the preparation of said specifications and was considering of the method by which the readiness of the core of the jetty to receive the crest blocks was to be determined and consenting to paragraph 61 of said specifications, he understood and accepted the words "United States agent in charge" as referring to the person who should be stationed at the site of the work as chief inspector and should have the jetty constantly under his visual observation, and to no other person, and that affiant understood that there was not to be any appeal, under said specifications, from such decisions of said chief inspector to any engineer or other officer of the United States; that the only method by which said work could be protected against delays, injurious to the contractor and to the work itself, was by such instant and final decisions regarding the readiness of the core, to be made by the inspector present on the work, and that, on any stipulation or understanding that said question was to be subject to decisions of any engineer, officer or agent of the United States other than said chief inspector, affiant would have hesitated to assent to said specifications. Affiant further says that, from numerous conversations with said Henry C. Ripley both before and after said specifications were signed, he knows that said Henry C. Ripley's understanding of said paragraph 61 in said particular was the same as affiant's, above stated. Affiant further states that, although he was present on said improvement but a few times during the work of said Henry C. Ripley on the same, he knows that said Henry C. Ripley, before laying any crest blocks on the jetty, made numerous but futile applications to the agent of the United States in charge at the work, viz., F. Oppikofer, for permission to lay said blocks [Signed] Lewis M. Haupt.

Subscribed and sworn to before me this 19th day of September, 1911.

J. K. Lee Smith,
Notary Public.

EXTRACTS FROM PRINTED EVIDENCE IN COURT OF CLAIMS.

Form of Correspondence between Engineer's Office at Galveston and F. Oppikofer.

February 18, 1904.

Mr. F. Oppikofer,
U. S. Assistant Engineer, Tarpon, Texas.

* * *

[Signed] Edgar Jadwin,
Captain, Corps of Engineers, U. S. A.

Tarpon, Texas, February 23, 1904.

Captain Edgar Jadwin,
Corps of Engineers, U. S. A.

* * *

[Signed] F. Oppikofer,
Asst. Engineer.

June 23, 1904.

Mr. F. Oppikofer,
Assistant Engineer, Tarpon, Texas.

* * *

[Signed] E. M. Hartrick,
Asst. Engineer.

(Printed Evidence, pp. 40, 41.)

Testimony of Henry C. Ripley.

Question. Did or did not Captain Jadwin direct and require you to construct the work in the way you describe?

Answer. I might say in explanation that Captain Jadwin was away a large part of the time during this contract and that an assistant by the name of Captain Hoffman was there, although he did not have authority to pay for any work. He had some authority, and was really in charge, but at the same time he would not take any responsibility without first submitting the matter to Captain Jadwin, who was the responsible officer in charge. The dealings, of course, that I had were mostly with the inspector immediately on the work who had the authority to direct my work and to keep track of the quantity and the manner in which it was placed. This was F. Oppikofer, Assistant Engineer, and immediately in charge of the work of construction. My instructions to do the work in the way mentioned were given by him—Mr. Oppikofer. I received all my instructions in regard to the actual work on the ground from Mr. Oppikofer.

(Printed Evidence, p. 48.)

Testimony of Herbert S. Ripley.

Question. Why didn't he begin to lay the cap blocks, then, after the first month's work?

Answer. Well, the United States, through their agent, Oppikofer, told him not to. I don't know but what the office gave instructions to that effect. My father would go over and consult with the Galveston office once a month, at least.

(Printed Evidence, p. 125.)

Question. What answer did you hear Mr. Oppikofer make to your father on this point?

Answer. The only answer I heard him make was he was not ready for them yet, and he would officially inform him when he was ready.

Question. Did he actually have the cap blocks ready for use when he first proposed to put them on?

Answer. I don't know as to that. He had to order them and told Mr. Oppikofer he would have to order them a month ahead of the time he needed them because it takes some time to get them out.

(Printed Evidence, p. 126.)

* * *

Answer. If they had gotten out all those blocks and kept them until the last two or three months before using them, the quarry would have been so jammed with them that they couldn't have carried the other work on. * * * They couldn't store immense stone like that.

* * *

Question. Now, what did Mr. Oppikofer assign as his reason for not permitting you to put on the crest blocks when you desired to do so?

Answer. The only reason I ever heard him say, he would tell us when to order the crest block. He said, "Don't order the crest block: I will tell you when to order them."

(Printed Evidence, p. 132.)

Testimony of Robert P. Clark.

Question. What was the particular occasion, if any, of your knowing about that work and about the situation and conditions, if any?

Answer. From having done the previous contract and having figured also on that contract. The previous contract I refer to was for improvement of that pass. Our firm of Clark & Co. did this previous work and of course I frequently visited it. Even before this we had worked on two improvements for the Government at the same pass, one in 1888, being the revetting of the end of St. Joe Island, and the second was not done for the Government but for the Aransas Pass Harbor Company on the breakwater constructed on the Haupt plan, the same one on which Mr. Ripley afterwards had his contract.

Question. When was it you were engaged on the last of these three improvements you speak of at that place?

Answer. 1901 and 1902, I think.

(Printed Evidence, p. 86.)

Question. What other Government work have you done beside at Aransas Pass?

Answer. Our firm, Clark & Co., did the Government work at the mouth of the Brazos River, at Galveston, Sabine Pass, and Calcasieu Pass.

(Printed Evidence, p. 89.)

Question. Now, Mr. Clark, in constructing this jetty it would be necessary and proper from an engineer's standpoint to allow the core to settle somewhat before the crest blocks were put on, wouldn't it?

Answer. Well, I should not think it would be necessary to allow it any more settlement than what it would naturally get from the time of discharging one barge until the time of discharging another. We have so much rough sea down there it gets in place pretty quick—washes into place.

(Printed Evidence, p. 93.)

Testimony of E. M. Hartrick.

Question. Did you give any instuctions to Mr. Oppikofer?

Answer. We gave general instructions to carry on the work; nothing particular in starting.

Question. In what particular was it necessary to instruct him?

Answer. None. He was an old employee of the Government and understood his duties pretty well.

(Printed Evidence, p. 142.)

Question. Now, prior to the conversation had with Mr. Ripley in which you say he referred to the fact that Mr. Oppikofer was too strict with him, had you personally heard any complaint about the execution of this contract from Mr. Ripley or his agents or employees?

Answer. No. I heard nothing—unless you would say that of Mr. Oppikofer when he would send memorandum now and again that Mr. Ripley was kicking as usual.

* * *

Answer. * * * Ripley had continued to complain about these things every time he came, and on the 19th of August I went down and stayed until the 23d.

* * *

Question. What stage of progress was the work in at the time you went there?

Answer. Roughly I should say nine-tenths done.

Question. Were they laying any crest blocks while you were there?

Answer. They did.

(Printed Evidence, pp. 143, 144.)

Testimony of Edgar Jadwin.

Answer. * * * The instructions to the assistant engineer were prepared and submitted to my predecessor and myself during the time he was turning over the district.

* * *

(Witness produces copy of instructions, which are attached and marked "Exhibit 6.")

[*Letter.*]

U. S. Engineer Office,
Galveston, Texas, June 23, 1903.

Mr. F. Oppikofer,
Assistant Engineer, City.

Sir: On the 30th day of June, 1903, you will leave Galveston for Aransas Pass, having first furnished yourself with all papers, maps, charts, and information necessary for carrying on the work according to contract and specifications.

Former instructions will remain in force until further orders. Mr. C. J. Howard will report to you as recorder on July 1, at Aransas Pass. You will, to the best of your ability, instruct him for the position of junior engineer. * * * You will also have your recorder make a complete record of all landmarks, beacons, etc., for the laying out of north jetty and old Government jetty. Have the notes carefully plotted and a tracing sent to head office. * * * Have him compile data and plot same, so that the chart or map will show the location of all work laid out by you, with the reference points governing the same, and such other information as will enable an intelligent overseer to supervise the work in the absence of the Assistant Engineer. * * *

[Signed] C. S. Riché,
Capt. Corps of Engrs.

(Printed Evidence, pp. 180, 155, 156.)

Answer. * * * He (Ripley) wrote the letter and I forwarded it recommending approval.

* * *

[*Letter.*]

Rockport, Texas, May 22, 1904.

Capt. Edgar Jadwin,
Corps of Engineers, U. S. A., Galveston, Texas.

Captain: I have just returned from the quary at Granite Mountain, where I have been to consult with Mr. Steinmetz, of the firm of J. M. O'Rourke & Co., in regard to the large granite blocks to be used in the construction of the jetty at Aransas Pass.

It is found to be very difficult, if not impossible, to get out these blocks of the exact dimensions required by the specifications without resorting to the use of stonecutters. I know that it was not contemplated that this should be done when the specifications were prepared. * * *

[Signed] H. C. Ripley.

(Printed Evidence, pp. 182, 143, 150.)

Question. Did you have any discussion or conversation with Mr. Ripley or his representatives with reference to the laying of the crest blocks or capstones?

Answer. I don't recollect any prior to this referred to, which took place in the spring of 1904, probably April or May.

(Printed Evidence, p. 183.)

Question. You were absent from your office a large part of the time during which this Ripley work was going on?

Answer. Yes, sir.

Question. You were in New York, I believe?

Answer. Yes, sir.

* * *

Question. Largely disabled from attending to business, were you not?

Answer. Yes; there were certain times that I could not write—perhaps a day or two days at a time after an operation I would be in a dark room. Then I was around until I had another operation.

Question. How many of these operations did you undergo?

Answer. Eighteen—nine the first time and nine the second.

(Printed Evidence, pp. 186, 187.)

Question. The Assistant Engineer is not an inspector?

Answer. He was our chief inspector, using the word one way.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Nos. 887 and 888.

HENRY C. RIPLEY, *Appellant,*

887 *vs.*

THE UNITED STATES.

THE UNITED STATES, *Appellant,*

888 *vs.*

HENRY C. RIPLEY.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR HENRY C. RIPLEY ON MOTION FOR SECOND REMAND TO THE COURT OF CLAIMS.

The Court of Claims in its main findings of fact took no account of Henry C. Ripley's making, or failing to make, appeal to the district engineer at Galveston or to the Chief of Engineers against the chief inspector's denial of the right to lay the crest blocks on the jetty during some six months in 1903 and 1904. The more reasonable assumption is that from the entire specifications (parts of which only are before this court) and the plan on which the work was laid out, the court concluded that there was no obligation or occasion to take such an appeal. For all that this court knows, however, there may be other reasons, *e. g.*, that the Galveston office was constantly informed in other ways of what was going on at Aransas Pass harbor, and refused to override the inspector's decisions, or that the engineer officer himself put it out of Ripley's power to seek redress by a formal appeal.

The remand was made by this court with the evident purpose of deciding the case before the adjournment for the term; the Court of Claims being enjoined to make its return "with all convenient speed." It was not deemed proper on the part of Henry C. Ripley that any motion should be made here, in that state of the case, for any amplification of the record beyond that for which the court had called. In our brief on the added findings, however (pages 4 and 6), it was suggested that, if this court should take the view that there was a *prima facie* necessity of a formal protest by Ripley against the decisions of the chief inspector, the ends of justice would require that the court be informed of the reasons, if any, why no such protest was made. The present motion merely puts that proposition in form.

There have been filed with the motion an affidavit of Ripley himself, an affidavit of Lewis M. Haupt and a certified copy of the evidence in the Court of Claims.

Under the heads of three main propositions of fact we proceed now to state, with brief comments, the evidence on which the motion rests.

The Inspecting Engineer Was the Final Judge of the Condition of the Core.

The official title of F. Oppikofer, whose station was at the site of the work and who has often been referred to in this record as "chief inspector" was "Assistant Engineer." (Official letters, p. 8, *sup.*) Ripley's dealings were chiefly with this officer; it was he who gave instructions for the work. (pp. 8 and 9, *sup.*)

Under paragraph 6 of the specifications (Transcript, p. 6) it was the "U. S. agent in charge" who should determine when the core or mound was sufficiently consolidated to receive the crest blocks.

Paragraphs 40, 41 and 42 of the specifications (Transcript, p. 5) contain the same phrase, "U. S. agent in charge," and illustrate the relative functions of the officer so named and the district engineer. The former is designated as the judge of the correctness of the method of weighing and of the proper placing of the materials and the latter as the judge of the necessity of the contractor's furnishing labor and appliances to the Government for its own use in making surveys of this work and other localities thereabouts or of his boarding the Government's employees. These latter matters did not require quick decision; the former, like the subject of paragraph 61, did require quick decision.

The affidavit of Lewis M. Haupt makes it clear that the man in charge at the work, and none other, was to judge of the condition of the core. Mr. Haupt had been consulting engineer for the Aransas Pass Harbor Company on this same project. On the invitation of Captain Riché, then in charge at Galveston, and at the request of Ripley, he had assisted in preparing the specifications. He deposes that the words "U. S. agent in charge" in paragraph 61 were understood by himself and Ripley as referring to the chief inspector, who was to be constantly present on the work; also that they did not understand that the decisions of this functionary were to be subject to review at Galveston. Mr. Haupt also explains the necessity of prompt decision in all such matters by some authorized person on the ground.

Oppikofer himself in all his dealings with Ripley maintained the attitude that it was his function and his alone to decide about the capping. "*He* was not ready"; *he* would let Ripley know when "*he* was ready"—"*he* would tell us when to order the crest blocks." (Printed Evidence, pp. 9 and 10, *sup.* Italics ours.)

The Government's attorneys in their "supplemental" brief, treating of the additional findings, labor to draw a distinction between the "U. S. agent in charge" and the functionary in local control at the jetty; and they endeavor to make it appear that the phrase which we quote referred to the engineer in charge at the Galveston office, the district engineer. They are conspicuously unfortunate in their criticism (p. 4) of the Court of Claims' phrase "the Assistant Engineer in immediate charge of the work of inspection." As we have shown "Assistant Engineer" was the exact official name of Oppikofer.

Below is Captain Jadwin's testimony on this identical point (Printed evidence, p. 14, *sup.*):

> Question. The Assistant Engineer is not an inspector?
>
> Answer. He was our chief inspector, using the word one way.

Counsel do not venture to quote paragraphs 41, 42 and 61 of the specifications, the last of which governed the laying of the crest blocks; but paragraphs 35, 38 and 40, which they quote, do not aid their argument. In those paragraphs the phrase "engineer officer in charge" is used with reference to those larger matters of policy which called for decision at Galveston, viz., the general superintendence of the work of all agents, the fixing of working hours, etc. The phrase "U. S. agent in charge" is employed with reference to disagreements as to the weight of stones for immediate use; the stones having been weighed by one of the two inspectors subordinate to Oppikofer. The same phrase is employed, we repeat, with reference to the weighing of empty cars constantly returned for immediate reloading. It is inconceivable that a car was to stand idle, say from three days to a week, while the Galveston office was determining, on facts communicated from the jetty, whether there was need of weighing it.

The matters committed by paragraphs 35, 38 and 42 of the specifications to the discretion of the "engineer officer" were those on which there would be sufficient leisure for consideration and action at Galveston, concerning chiefly the life and duration of the contract and the computation of the contractor's pay. Moreover they called for a broader discretion than that of the assistant who merely supervised the daily operations. We do not find the words "U. S. agent in charge" used anywhere with reference to these larger questions. They are used with reference to questions not expected to be so important, which would arise day by day at the jetty, and on which no superior officer would be competent to give a prompt decision.

There is always an "engineer officer" in charge on Government improvements. Ordinarily he is the district engineer, who has drawn the specifications and has awarded the contract. It would be strange indeed if in any matter requiring action of this chief officer a contract should use the words "United States agent." That term could only be used with reference to some subordinate functionary who was to be associated with the particular project, and whose title could not be foretold. In this instance the "United States agent" happened to bear the title of Assistant Engineer; he had under his command, beside at least two inspectors, an "intelligent overseer" or "junior engineer." (Printed evidence, p. 13, *sup.*); as we have seen he had some large responsibilities; but the record makes it impossible to confound him with his chief, "the engineer officer in charge."

It was reasonable to give Oppikofer this responsibility because he was an "old employee of the Government" (Testimony of E. M. Hartrick, p. 11, *sup.*).

May not this clear distinction between United States agent in charge (Oppikofer) and the district engineer, and the lack of jurisdiction of the latter in the matter here under discussion, have been the sole reason of the Galveston office in its refusals to give Ripley relief?

In the brief filed for the United States on the main case (p. 6) there is a suggestion that "physical examination" was the only proper basis for a conclusion that the core was consolidated. We cordially assent to the proposition that physical examination was *a* proper basis for testimony on this point; and the fact is relevant to two aspects of the case: (1) Oppikofer was making, was charged to make, this physical examination day by day. (2) It would not be possible for the district engineer at Galveston to make these examinations day by day, and for this reason the specifications did not provide for the exercise of any judgment by him.

It Was not Feasible to Make Any Formal Protest to the District Engineer.

It appears from statements of Ripley, both in his deposition and in the present affidavit, and in those of Captain Jadwin that the latter was at his office a very small part of the period in which Ripley was seeking permission to lay the crest blocks. Ripley says Jadwin was absent, in New York, during October and November, 1903, during January and a part of February, and during June, July and a part of August, 1904. Jadwin testifies that he was in New York a large part of the time and had eighteen operations performed on his eyes. (Printed evidence, pp. 4, 8, 13 and 14, *sup.*)

Ripley also testifies that Captain Hoffman, an Assistant

Engineer, was acting in Jadwin's stead to some extent at the Galveston office during his absence, but would not take any responsibility without first submitting the matter to Jadwin (Ib.). If the contract had really stipulated that Ripley should appeal in this particular matter from the inspecting engineer to the district engineer, he surely would have been discharged from that requirement by the plan pursued by Captain Jadwin, of putting himself out of reach without leaving a vice-gerent at his office.

The more rational view to take of these facts, however, is that they merely corroborate the other evidence that Oppikofer's rulings about the condition of the core were not to be subject to review.

The Galveston Office Was Constantly Advised of the Inspecting Engineer's Action and Would not Overrule Him.

In his affidavit Ripley states, in effect, that in November, 1903, Oppikofer's action regarding the laying of the crest blocks and his own objection thereto was brought by him to the attention of the Galveston office; also that in February, 1904, at a personal interview with Captain Jadwin, he brought the matter up again.

The affidavit also shows that Oppikofer made frequent reports to the Galveston office, and, as Ripley believes, mentioned the repeated requests for permission to lay the crest blocks.

Captain Jadwin also testifies of the interview to which Ripley refers but his recollection is that the time was "in the spring of 1904, probably April or May."

The first crest blocks were laid on May 7, 1904 (Transcript, p. 25). Permission for this particular work must have been given by Oppikofer something like a month before; that time was needed to get out these large blocks at the quarry, two hundred miles away, and transport them by rail to Rockport (Testimony of Herbert S. Ripley, pp. 9 and 10, *sup.*). Ripley did have an interview with Captain Jadwin on May 22d; but the subject of that was the method of testing the crest blocks which were then coming in. The readiness of the core to receive the blocks was then a closed issue—it was already receiving them; and Ripley certainly was not then making an idle protest against Oppikofer's earlier forbidding of that work.

The only reasonable theory of Captain Jadwin's testimony is that his memory failed for the moment with respect to the time of this conversation; he confounded this with one of the other interviews, occurring on Ripley's periodical visits, on other subjects. This mistake is natural enough with reference to a locality where February is so much like the spring that the planting of staple crops has commenced and early vegetables have matured. Ripley's affidavit is the more trustworthy because it is the result of investigation subsequent to the trial.

Neither of the two chief witnesses for the Government proves infallible, though they might have found a record for everything on which they were interrogated. The following is from Mr. Hartrick's deposition:

> Question. Did you give any instructions to Mr. Oppikofer?
> "Answer. We gave general instructions to carry on the work; nothing particular in starting.
> Question. In what particular was it necessary to instruct him?
> Answer. None.
> (Printed Evidence, p. 11, *sup.*)

Captain Jadwin on the other hand read into his deposition a letter of instructions given to Oppikofer by Captain Riché, This bears date of June 23, 1903. It contains particular directions for the installation of the work, including instructions to be given to an embryo "junior engineer." (Printed Evidence, pp. 12 and 13, *sup.*)

Herbert Ripley testifies that his father "would go over and consult with the Galveston office once a month at least." (Printed Evidence, p. 9, *sup.*)

Mr. Hartrick testifies of frequent reports made by Oppikofer to the Galveston office that Ripley was "kicking": this, before the dispute arose about the acceptability of the crest blocks. In speaking of the events of the summer following this witness says that Ripley "had continued" to complain. The one serious ground for the earlier complaints ("kicking as usual"), was the denial of the right to lay the crest blocks. It is incredible that this matter, with Ripley's objections to Oppikofer's action, was not communicated by Oppikofer in these reports, covering six or seven months.

Recapitulation.

For the purpose of this motion we are required to show merely a probable case calling for the additional findings of fact proposed. We submit that the evidence now offered creates a very high probability that the Court of Claims, on full proof, would make affirmative findings on the first, second, fourth and fifth questions of fact set out in the motion and on the third proposition would find that there was *not* present at the Galveston office in October, November and December, 1903, or in January, March and April, 1904, any officer of the United States exercising the authority in question.

The affidavit of Lewis M. Haupt states the reason why the present case could not be made in the little time remaining at the last term of this court, viz., that Ripley was still in South America and no affidavit or advices could have been obtained from him.

ERRORS IN ARGUMENTS SUBMITTED FOR THE GOVERNMENT.

We embrace this, the first opportunity we have had, to correct some errors which appear in the last briefs filed for the Government, viz., the supplemental brief, dealing with the additional findings made by the Court of Claims, and the reply brief on the main case.

The Court of Claims has not found, as counsel argue, at page 2 of the supplemental brief, that Oppikofer's mistake consisted in his "being unable to perceive that which appears patent to the court, to wit, that four or five months was sufficient time for the core to consolidate." The finding is that he did perceive this. "Knew" is the word used by the court. It would be of no consequence if he had no reason to know this other than the lapse of time. In reality the court has found that "it was manifest" that the core had fully consolidated. What Oppikofer was denying was a thing plain to be seen of all men. The lapse of time signified the same thing that his eyes, whenever he chose to use them, determined beyond any possibility of cavil.

In the reply brief (page 6) counsel assert by an interlineation with pen that only "Mr. Clark who did *some work* on the jetty for the Harbor Co." in addition to Ripley, his son and Mr. Haupt, have testified regarding the condition of the core. (Italics ours.) When evidence, instead of findings is cited, it should be cited in a way that does not take away its value. We therefore call the Court's attention to the actual testimony sufficient to identify the witness Clark and to show his means of knowledge. The statement as to the need of time for the jetty to consolidate is:

> "Well, I should not think it would be necessary to allow it any more settlement than what it would naturally get from the time of discharging one barge until the time of discharging another. We have so much rough sea down there it gets in place pretty quick—washes into place." (Printed Evidence, p. 11, *sup.*)

Surely this testimony justifies our statement, at page 6 of our reply brief on the main case (grounded more particularly on the testimony, less favorable to Ripley, of Ripley himself and Mr. Haupt), that one-fifth of the time required by Oppikofer was all that could be needed for consolidation of the core.

To qualify himself to give an opinion in this matter, Mr. Clark testifies (p. 10, *sup.*) that his firm had performed one previous contract (for the Aransas Pass Harbor Company) on this identical jetty and performed one contract for the United States following on Ripley's work.

Counsel's statement at page 4 of their reply brief that the Court of Claims does not find that permission to lay the crest blocks was refused about two months after the 18th of August, 1903, is hypercritical. The court finds that "commencing in October, 1903, when about three hundred feet of the core had been built up to the required elevation Ripley was permitted to lay some slope stones" and the context of the findings, as well as the argument in the former briefs, shows that this permission to lay some slope stones was a mere concession to Ripley after he was forbidden to lay the crest blocks. If there could be any doubt on this point, that would be cleared away by Ripley's affidavit stating that the matter was brought to the attention of the Galveston office, at the latest, in November, "about" November 2d, to be exact.

We do not really, as counsel state at page 7 of their reply brief, complain that in computing the *per diem* of Ripley's expense the Court of Claims has not used as a divisor the number of days actually worked, instead of the entire number of elapsed days from the beginning to the completion of the work; but we do say that if the Court adopts this latter divisor it should be applied to the *elapsed* days (145) of the wrongful detention.

Of course, the contractor understood that he would be idle on Sundays and holidays and a considerable number of bad days; but just so did the Government's representatives, when they held him on the work beyond the due time, know that for the days of his postponed labor he would be detained a proportion also of days of bad weather, as well as Sundays and holidays. The court has found in substance that but for the unlawful delays, the work would have been completed by April 25th (Original brief for Ripley, p. 14). What happened to Ripley after that date, the engineers necessarily foresaw. They knew he would be detained many other days besides those on which he should be able to work; and, even by the strictest rule of damages, they must be held to have inflicted on Ripley the burden of the entire elapsed time subsequent to April 25th.

Counsel are right when they say that multiplying the expense (materials excepted) of each elapsed day by "the number of days the Government delayed the contractor" is the way to determine the damages suffered; but the Government delayed the contractor, *i. e.*, held him on the work, 145 days.

We submit that counsel's comparison, at pages 9 and 10 of their reply brief, of the working days previous and subsequent respectively to May 1, 1904, has no relevancy to the case before this court. The court has found that the entire 58 (strictly 60) days of actual labor required after May 1 to complete the work would have been performed before that day if Ripley had not been unlawfully delayed. We are willing that counsel should elect whether Ripley be compensated for the 58 working days at the *per diem* proper to them, $408.99, or for the 145 elapsed days in which the 58 are included, at the proper *per diem*, $162.70.

"U. S. agent (U. S. engineer) in charge" is a quotation, as from the specifications, used by counsel at page 7 of their supplemental brief. We are sure counsel do not intend to mislead the court; but the parenthetical part of this phrase is their own interpolation. Nowhere, we repeat, do the specifications contain in apposition the two terms which counsel here use between quotation marks. The term "engineer" is always used with respect to the large matters, proper to be decided at Galveston; "U. S. agent in charge" is used with respect to the larger of those matters which required decision on the ground; "U. S. agent," is used with respect to the ordinary routine of the work, the mere superintendence, by inspectors, of the placing of material.

In the matter of the inspection charges imposed on Ripley counsel at page 11 of the reply brief assume that the contractor was to be chargeable unless the Government was at fault in the delays; they concede that Ripley was not in fault. In fact the specifications did not relieve the Government of this expense with respect to any delay "arising through no fault of the contractor." Ripley, of course, is entitled to be reimbursed with respect to delays that were providentially caused as well as with respect to those which were caused by improper action of the Government's agents.

It is but justice to the Court of Claims to challenge the position taken by counsel at page 3 of their supplemental brief that the supplemental findings do not import that the core was amply consolidated, and that the inspecting engineer was conscious of that fact, the while that permission to impose the crest blocks was denied. How anything can be "manifest" unless it is a fact, we cannot conceive. Nor could we charge the Court of Claims with not saying that a "gross" mistake was not committed consciously, when the person who committed it was "an old employee" in that particular business; when this person delayed the work for five months or more beyond the time which was required in the performance of other contracts, one earlier and one later, on the same work, as necessary for this consolidation, and when an engineer of the first rank (Ripley) was constantly pressing the facts upon him. In one particular the court might be deemed whimsical, but that is all. We do not understand why the court after convicting the inspecting engineer in this one particular, and so supporting the judgment given to claimant with respect thereto, should care to inform this court that the evidence does not show him to have been governed by wrong purposes in any other particular; but, to do the court credit, we must give this reading to the findings; they offend rule and reason unless the other and smaller points in the controversy are understood to be the subject of the observation regarding the lack of "other," evidence. We must give some meaning to the court's word "other".

We have not included in the present motion the matter of the inspecting engineer's consciousness that he was invading Ripley's rights; this, for the reason just stated, that the findings seem sufficiently clear on that point. If it be proper and desirable, however, we should be glad to argue orally before this court, on the entire findings and the printed evidence now certified, the question of animus, inspired by the superior officers and consulted and reflected by the inspecting engineer, against Ripley as associated with Lewis M. Haupt in the plan of jetty to which the Corps of Engineers at large was opposed.

From what counsel have said in the paragraph commencing at the bottom of page 3 of their supplemental brief it would be inferred that the Court of Claims has made two returns to the mandate of this court. In fact, the Court of Claims revised its original draft of supplemental findings and has made but one return.

This court in its opinion which precedes the mandate of the Court of Claims has not expressed any view as to the significance of Ripley's sending or not sending to the Galveston office any protest or notice in the matter of the postponement of the laying of the crest blocks; it has merely, in the mandate itself, called for a finding on this isolated fact. This motion is necessarily made contingent upon the court's taking the view from the present record that it was incumbent on Ripley to give such a notice. We respectfully contend, however, that the present record proper (not including the evidence submitted with this motion), on full consideration, shows that no review of the inspecting engineer's decisions in this particular matter was intended by the parties. In this case, of course, the Court might well ignore this motion; otherwise, we submit, the motion should be granted.

Respectfully submitted,

William H. Robeson,
Attorney for Claimant.

Benj. Carter,
F. Carter Pope,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]. 1910

No. [redacted]. 498

HENRY C. RIPLEY, APPELLANT,

vs.

THE UNITED STATES.

No. [redacted] 499

THE UNITED STATES, APPELLANT,

vs.

HENRY C. RIPLEY.

[illegible] THE COURT OF CLAIMS [illegible]

FILED [illegible]

(22508 AND 22509)

SUPREME COURT OF THE UNITED STATES.

October Term, 1910.

Nos. 887 and 888.

HENRY C. RIPLEY, APPELLANT,

vs.

THE UNITED STATES.

THE UNITED STATES, APPELLANT,

vs.

HENRY C. RIPLEY.

It is ordered by the court that the record in this case be remanded to the Court of Claims, and that said court be instructed to find and certify to this court, as matters of fact, in addition to the facts found and certified in said record:

First. Whether, when the claimant was laying the slope stones and during the months of December, 1903, and January, February, March, and April, 1904, as recited in Finding VII, the inspector in charge knew "that large parts of the work done by the claimant had fully settled and consolidated."

Second. Whether in the various refusals to permit the laying of crest blocks stated in Finding VII the inspector in charge acted in good faith.

Third. Whether at any time the claimant notified the engineer officer in charge or the Chief of Engineers that the inspector in charge wrongfully refused to permit the laying of the crest blocks, and if such notice was given, whether it was oral or written, when the notice or notices were given, and what action, if any, was taken by such superior officer.

And it is further ordered that the said record, with the said additional findings of fact, be returned to this court with all convenient speed.

April 24, 1911.

Court of Claims of the United States.

HENRY C. RIPLEY
v. No. 28555.
THE UNITED STATES.

Order.

Pursuant to the mandate of the Supreme Court in the case of Henry C. Ripley, No. 887, and United States *v.* Henry C. Ripley, No. 888, directing this court to certify additional findings, said court now files said supplemental findings, and directs the clerk to certify the same to the Supreme Court without delay.

[SEAL.] BY THE COURT.

Filed May 17, 1911.
A true copy.
Test this 17th day of May, A. D. 1911.

Supreme Court of the United States.

HENRY C. RIPLEY, APPELLANT,
vs. No. 887.
THE UNITED STATES.

THE UNITED STATES, APPELLANT,
vs. No. 888.
HENRY C. RIPLEY.

In response to the order of remand in the above-entitled cause of April 24, 1911, instructing this court to find and certify with all convenient speed, in addition to the facts heretofore found and certified:

First. Whether, when the claimant was laying the slope stones and during the months of December, 1903, and January, February, March, and April, 1904, as recited in Finding VII, the inspector in charge knew "that large parts of the work done by the claimant had fully settled and consolidated."

Second. Whether in the various refusals to permit the laying of crest blocks stated in Finding VII the inspector in charge acted in good faith.

Third. Whether at any time the claimant notified the engineer officer in charge or the Chief of Engineers that the inspector in charge wrongfully refused to permit the laying of the crest blocks, and if such notice was given, whether it was oral or written, when the notice or notices were given, and what action, if any, was taken by such superior officer.

The court finds, supplemental to said Finding VII, as follows:

(1) When denying permission to the claimant to lay crest blocks, as stated in Finding VII, the inspector in charge knew from the time which had elapsed that large parts of the core theretofore completed

by the claimant had fully settled and consolidated and were ready for the crest blocks to be laid thereon.

(2) The refusal of said inspector to allow crest blocks to be laid at the time requested in said Finding VII thereby unreasonably delayed the work and was, on his part, a gross mistake. There is no other evidence of bad faith on the part of the assistant engineer in immediate charge.

(3) There is no evidence to show that any protest or notice was ever made to the engineer in charge (whose office was in Galveston) or to the Chief of Engineers (whose office was in Washington) or to any officer other than the assistant engineer in immediate charge of the work of inspection.

BY THE COURT.

Filed May 17, 1911.
A true copy.
Test this 17th day of May, A. D. 1911.
[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

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